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THE MEMORANDUM

Vol. III No. 2

LAW DEPARTMENT SEPTEMBER, 1917. SOUTHERN RAILWAY COMPANY

LIABILITY FOR INJURIES DUE TO ALLEGED SUCTION FROM PASSING TRAINS.

Every person who had occasion when a child to frequent railroad yards or tracks no doubt was warned to keep away from moving trains on account of the danger of being sucked beneath and ground to pieces. Whether this is a false idea fostered in the minds of anxious mothers and nurses, or is in truth a real danger, this article will not attempt to state. It suffices to say that this idea, whether true or false, has been the basis of a number of lawsuits which have come before the courts of the country, the results of which have been almost universally in favor of the railroads. Actions of this kind are usually based upon the evidence of men who have seen newspapers and trash drawn beneath a moving train and upon testimony of college professors who claim to have made certain observations as to the effect of fast moving trains upon objects placed near the track. However, the courts, as a rule, refuse to consider such evidence, as is illustrated by the case of Graney v. St. Louis, I. M. & S. R. Co., 157 Mo. 666, 57 S. W. 276, wherein the court said:

> "The only knowledge in the wide, wide world that a train moving at a given rate of speed would generate a current of air that would suck under its grinding wheels a boy nearly twelve years of age, if standing within one or two feet of the track, was confined and confided to the two learned professors, who, like the Scottish maiden, the mother of the ghost child, 'hid their secret in their breasts,' and, though they did not, like her, 'die in travail unconfessed,' yet might as well have done so, so far as informing defendant was concerned."

It is well to note here that the professors referred to above did not state positively that a person could be drawn beneath a passing train, but that the pressure of the air from it would have a tendency to topple one over and make him lose his footing, and in this way he might fall beneath the train.

The case of Louisville & Nashville R. Co. v. Lawson, 161 Ky. 39, 170 S. W. 198, is a leading one on the subject here discussed. The facts are:

Simpson, a boy fifteen years old and weighing about 100 pounds, was sent out on the railroad track to look for his father. He went upon the defendant's right of way and started walking along a pathway near the tracks. After he had been walking up and down the right of way for some time, he saw a train approaching about 100 feet from him. As the train approached, he moved to the edge of a ditch about six feet from the track. While walking along the edge of the ditch he claimed to have been drawn under the train and severely injured.

The action for damages was predicated upon the negligence of the defendant in failing to moderate the speed of the train so as to prevent plaintiff's being drawn thereunder.

The plaintiff introduced evidence that moving trains would draw paper and mailbags beneath them. One person also testified that he had seen a train draw a man under it, but this evidence was very unsatisfactory in that the witness could not state who the person was or where it happened. The defendant proved by practical railroad men that they had never heard of a person being drawn under a train and did not believe it possible.

The court in holding that the defendant was entitled to a directed verdict, said:

> "We deem it unnecessary, for the purpose of this case, to pass on the question of the possibility of such an accident. We content ourselves with say-

ing that, even if possible, the probability of its occurrence is so remote that it cannot be said to be an accident which should, in the exercise of ordinary care, be reasonably anticipated by those operating railroad trains. That being true, a railroad company does not owe the licensees walking along the side of its tracks, and who know of the approach of trains, the duty of moderating the speed of the trains so as to prevent their being sucked under the trains. This court has adopted a very liberal rule with respect to licensees on tracks of a railroad company. Where in populous or thickly settled communities the tracks are used by such large numbers of persons that the presence of persons on the tracks may be reasonably anticipated, we are committed to the doctrine that it is the duty of the company under such circumstances to keep a lookout, to give warning of the approach of the train, and to have the train under reasonable control. Ill. Cent. R. Co. v. Murphy, 123 Ky. 787, 97 S. W. 729. The reason for requiring trains to be under reasonable control is to make the lookout effective; that is, to enable those in charge of the trains to stop them when persons are seen on the tracks or so near them as to be in danger of being struck by the trains. Here we are asked to go a step further and to say that the speed of the train must be reduced, not only to avoid striking persons on or near the tracks, but to prevent persons otherwise in a place of safety from being sucked under the train. Even in the Murphy case the court said: 'To compel the railroad trains to creep along under full control, in anticipation of what probably would not occur, viz., the meeting or overtaking a stray trespasser, would not be reasonable, because most likely wholly unnecessary. * * *'

"The number of persons actually sucked under trains, even if such cases ever occur, is so infinitesimally small it would certainly be unreasonable to require railroad companies to reduce the speed of their trains for the purpose of avoiding such accidents. If there be any danger from suction, certainly a licensee, who knows of the approach of a train and has a reasonable opportunity to do so, must get away from the track a sufficient distance to avoid being injured in that way."

The case of Graney v. St. Louis, I. M. & S. R. Co., supra, was an action for the death of a boy about twelve years old, who, while attempting to cross a railroad track, waited on a street crossing for a train to pass. He was standing about three feet from the track and was probably thrown down by the force of the air from the train and rolled under it. There were two appeals of the case. In the first the court held that there was sufficient evidence of negligence of the railroad company in operating its train in violation of a speed ordinance to take the case to the jury. However, on a later appeal a majority of the court were of the opinion that the accident was one which could not have been reasonably anticipated and therefore the company was not liable.

In the case of Davis v. Southern Ry. Co. (N.C.), 87 S. E. 745, it apeared that the plaintiff was walking on defendant's right of way and was overtaken by a freight train. Plaintiff's companion stated that he heard the train coming some time before it reached them and he warned plaintiff to look out for it. However, plaintiff stated that when he looked around the engine was right upon him, and shortly afterwards he was drawn under one of the cars by suction, which was caused by the speed of the train, and severely injured. The speed of the train was estimated at from six to thirty miles per hour. There was evidence of section men that trains running exceeding thirty miles per hour had frequently passed close to them without any such effect being produced. There was also testimony that the effect of a fast moving train would be merely to split the air and drive objects away from it. The court, in sustaining a non-suit given by the lower court, said:

"A railroad company is not under any legal obligation to regulate the rate of speed of its trains for the convenience of those using its right of way, for its tracks are always places of danger, and the pedestrian, who can easily step aside and avoid any danger, should do so on the approach of a train. He cannot, require the company to slow up any more than to stop. He must look out for trains and take care of himself, and the

engineer has the right to suppose that he has done so, or that he will do so in time to save himself. He must expect trains at all times, for he does not control the schedules of the company, and, besides, it has the right to run extra trains and to use its tracks for its purposes at any hours it chooses in the transaction of its business as a public carrier, and cannot be lawfully obstructed or impeded in the prosecution of this right, or prevented from its free and full exercise, in order to take care of those who go upon its property as trespassers, or as licensees, who are there by sufferance only."

Further along the court said:

"We are not bound to believe that has been done which is impossible according to the ordinary laws of nature, and this judicial notice extends to distance and speed and their relation to each other where the question is so presented as to require but the exercise of a little common sense, which even judges are supposed to possess, to determine how the fact is. It must be remembered, too, that Jennings (his companion) said that he did not feel any force of the wind, as the train passed by them, and he was almost touching the plaintiff as they walked along the Seaboard track together, and plaintiff said the force of the wind pushed him out, not in, and knocked him down, he scrambled to get away, and his leg was cut off. The utter improbability that he was sucked under the cars is shown by this story when compared with the other evidence, and our common knowledge that such is not the case at that part of the train, there being nothing to create a vacuum and cause an inrush of air, so as to create suction towards the car. The force of the air would be outward, centrifugal, rather than centripetal, and this is what knocked him down, if it be true that he fell and lost his leg in that way."

In the recent case of Southern Ry. Co. v. Young (Ga.), 93 S. E. 51, the court, in discussing the liability of railroads for injuries alleged to have been caused by suction from passing trains holds that if accidents of this kind should be anticipated by those in charge of trains, they should likewise be anticipated by the persons injured and they should guard against such accidents. The following is quoted from the opinion:

"If under the operation of natural laws, those in charge of the train should have anticipated that the plaintiff, who was standing near the track along which the train was moving rapidly, would probably be sucked under, in, or close up to or against the train, then the plaintiff would likewise have been bound to anticipate the same result. And if the accident was unusual and extraordinary, and the plaintiff in the exercise of ordinary care and diligence for his own safety could not have anticipated such result, neither could those in charge of the train be expected to anticipate this result."

It is to be noted here that there is a line of cases, particularly in New Jersey, which hold that it is a question for the jury as to whether or not a railroad company is liable for injuries to prospective passengers on station platforms caused by the wind and suction from a fast moving train which gave no warning of its approach. See Munroe v. Penn. R. Co., 85 N. J. L. 688, 90 Atl. 254; Schulz v. New York, S. & W. R. Co., 87 N. J. L. 650, 94 Atl. 579; Crotshin v. Penn. R. Co., 87 N. J. L. 11, 93 Atl. 110; and Paulding v. New York C. & H. R. Co., 116 N. Y. Supp. 518. However, in the case of Kozlowski v. Rochester, S. & E. R. Co., 126 N. Y. Supp. 609, the court held that the company was not liable where the passenger on the platform saw the train coming. The court said:

"A fast railroad train passing a local station is not required to slow down unless there is something to indicate to the engineer that it is prudent to do so. If two or three people are standing on the platform he is not to assume that they will step in front of the train or approach dangerously near it. The same rule should obtain in the operation of rapidly running cars on a street surface railroad. Even if the motorman saw the plaintiff and his companion, and if vigilant, he should have seen them, their presence on the platform would

> not suggest that they were in any danger from the car. * * * The car was in plain view of the plaintiff for at least 1,200 feet. He knew that it was coming very rapidly and without any slackening of speed. * * * He kept his position unchanged, when a step back would have placed him beyond the possibility of danger."

In conclusion, it seems that the courts, as a rule, give little weight to the belief and evidence that a living object, capable of the least resistance, can be drawn under a moving train by suction. However, conceding, for the sake of argument, that such an accident is possible, the courts go further and say that it is an accident which cannot, in the exercise of ordinary care, be reasonably anticipated by those operating trains and that the engineer has the right to presume that one who knows of the approach of the train will get away from the track a sufficient distance to avoid being struck by the train. The cases which have been quoted at length appear to be sound and well reasoned, and the precedent they have set will no doubt be followed by most of the courts of last resort in the event this question arises.

H. L. WALKER.

September 10.

RAILROADS—INJURY AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.—At the crossing where the plaintiff was injured there are three tracks, one a siding and two main tracks. Plaintiff testified he "stopped, looked and listened" after passing siding and reaching the first rail of the main tracks; that the car which struck him was coming from the north and his view of tracks in that direction was obstructed by a board fence extending within three feet of the railroad; that at the time he stopped he neither heard nor saw the train approaching and was struck immediately upon stepping on the first rail of the middle track. On cross examination he admitted seeing the front part and the side of the car nearest him a moment before receiving his injury, but too late to avoid the injury. HELD: Plaintiff failed to take proper precautions for his safety and cannot recover, notwithstanding he testified that he stopped, looked and listened immediately before attempting to cross. Smith v. Pa. R. Co. (Pa.), 100 Atl. 956.

PROXIMATE CAUSE—WATCHMAN WOUNDED BY INTRUDER IN WAREHOUSE.—A night watchman at a railway warehouse was shot by an intruder who entered the building through a door left unlocked by a doorman. The determination of the question of whether or not the railroad was negligent in failing to furnish the watchman with a safe place to work was left by the trial court to the jury, and judgment was rendered for the plaintiff. In reversing this judgment and denying that the failure of the doorman to lock the door was the proximate cause of the injury to the watchman, the Supreme Court of Kansas said:

> "The omission of the doorman to bolt the closed door, and the shooting of the plaintiff, did not bear to each other the relation of cause and effect. Omission to bolt the door was fraught with no peril to the plaintiff, active or latent. Bolted or unbolted, the door was not a hazard which plaintiff encountered in his rounds, and omission to bolt it neither supplied nor set in action any dangerous instrumentality or agency. It merely created a condition which made entrance to the building less difficult than it otherwise would have been, should anyone desire to enter. The injury resulted from the violent and malicious act of a desperate person who took advantage of the condition to enter the building for some purpose not disclosed. * * * While the plaintiff tried to reduce himself to the status of the inert and inanimate personal property in the building, he was part of the protection afforded to that property. He accepted employment as part of the barricade against theft, and not as a thing to be surrounded by an impregnable barricade. He was a guard over property, and not a thing to be guarded."

Fraser v. Chicago, R. I. & P. R. Co. (Kan.), 165 Pac. 831.

CARRIERS—FREE PASS—LIMITATION OF LIABILITY.—A stipulation in a free pass on defendant railway by which decedent assumed risks of accident was binding, and there could be no recovery for injuries not caused willfully. Mitten v. Delano (Ind.), 116 N. E. 761.

EXCLUSIVE JURISDICTION OF INTERSTATE COMMERCE COMMISSION OVER CAR SERVICE BY INTERSTATE RAILWAY COMPANY.

In THE MEMORANDUM for August, 1917, appeared a discussion of the liability of a carrier for failure to furnish prompt and adequate transportation service as affected by recent federal legislation. In connection with that article, the following excerpt from the brief for defendant in the case of Musick v. Norfolk & Western Railway Company, No. 602, before the Public Service Commission of West Virginia, is of interest as bearing on the exclusiveness of the Interstate Commerce Commission's jurisdiction over applications for the placement and distribution of cars by an interstate railway company:

Since the act of Congress of May 29, 1917, the sole jurisdiction of car service, including distribution or placement by an interstate railway company, is with the Interstate Commerce Commission.

The act of Congress of 29 May, 1917,* amends the Act to Regulate Commerce "in respect of car service." By this act it is made the duty of every interested carrier to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service. "Car service" is defined by the act to "include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of" the Act to Regulate Commerce. The Interstate Commerce Commission is also by the act, after hearing, vested with authority to establish reasonable rules, regulations and practices with respect to car service as that term is defined in the law. Here we have an express lodgment with the Interstate Commerce Commission of the control of and authority over the distribution of cars, etc., including such service as is demanded in the case at bar.

The Car Service Act includes the "distribution" of cars used in the transportation of property by any carrier subject to the provisions of the act. In other words, the color of the Car Service Act is the highway color, irrespective of the user of the particular vehicles at a given point in inter or intrastate commerce. Thus the inclusion of the Car Service Act is as broad as the highway for the same reasons as were given controlling effect in Southern Ry. Co. v. United States, 222 U. S. 20, holding that the words "on any railroad engaged" in interstate commerce extended the regulation of the act of Congress to all vehicles on the interstate highway, irrespective of the traffic they carried. Mr. Justice Van Devanter said in that case that the original Safety Appliance Act as enlarged by the amendatory act by the language we have quoted "intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce."

The purpose of Congress to extend the exclusive federal jurisdiction over the movement and distribution of cars is evidenced by the act of Congress known as the Priority Shipment Act, approved August 10, 1917,* which gave the President authority during the continuance of the war to "direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise." Under this legislation the administrator, designated by the President, of priority shipments, has directed certain railway and lake carriers, including the Norfolk & Western Railway Company, "daily to give preference and priority in the distribution of cars to coal mines served by them and transport the same so that bituminous coal for transshipment as aforesaid by lake shall have preference and priority in transportation." (Official Bulletin of August 21, 1917, being No. 87, Volume 1, page 16.)

The act of 29 May, 1917, is self-executing. A duty is declared upon every carrier to establish and enforce just and reasonable rules for the distribution of cars. Commensurate with and equal to this duty is the power in the carrier to establish such rules. The act provides that the exercise of this initiative by the carrier shall be reviewed upon hearing by the Interstate Commerce Commission. This duty and this power can *only* be reviewed by the Interstate Commerce Commission having nation-wide power and equipped with expert knowledge. Moreover, a primary purpose of the Interstate Commerce Act, to which the Car Service Act is an amendment,

* See THE MEMORANDUM for June, 1917, p. 123.

* See THE MEMORANDUM for August, 1917, p. 15.

was to inhibit discrimination. This purpose will be defeated if to various commissions this question is committed with the result of a varying decision: Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. The Shreveport Rate Case (234 U. S. 432) is in accord with this view. In that case state-made rates, which worked discrimination against interstate rates, could not be displaced by federal authority until that authority had been exercised in the form of an order of the Interstate Commerce Commission directing the carriers to cease the discrimination by raising the state-made rates. In the instant case the railway company has by tariff excluded the loading of coal and hence distribution of cars for that purpose on the Red Jacket Siding. No action other than the automatic operation of the Car Service Law upon this status is needed to cause the act of Congress to have full application to the situation thus displacing state regulation, however made.

To recapitulate then we say:

1. The Car Service Act of Congress is a regulation from the highway viewpoint and covers all cars irrespective of the kind of traffic for which they are being or have been used;

2. The Car Service Act lays upon the carriers the duty and vests in them the corresponding power to make rules (which may be made by tariff or otherwise) for the distribution of cars, is self-executing, and vests in the Interstate Commerce Commission the sole power to review the administrative question whether a given tariff or rule for distribution is reasonable.

RAILROADS — CONTRIBUTORY NEGLIGENCE. —Plaintiff cannot claim the benefit of the rule that contributory negligence is not to be ascribed as a matter of law to one who, through fear and bewilderment, makes an injudicious choice of means of escape from a sudden peril when, in an action against a railroad company for injuries resulting from a crossing collision, the evidence shows that the defendant's only negligence was in running the train at 16 miles an hour, and the plaintiff while driving team at an ordinary walk could have seen the train when it was 300 feet away, and he was 22 feet from the track, and there was nothing to prevent his turning to one side excepting his fear and excitement. Moler v. Chicago Ry. Co. (Kan.), 166 Pac. 488.

MASTER AND SERVANT — OBSTRUCTIONS NEAR RAILROAD TRACK PLACED BY THIRD PARTY—NOTICE TO EMPLOYER.—A railroad company is not liable for injury to an employee caused by a coal chute door which was lowered by an outsider unless there was something to bring notice to the employer that people were in the habit of lowering the door so as to create a dangerous condition and notice to a conductor by a third party is not sufficient to bind the company. Mathews v. Alabama G. S. R. Co. (Aa.), 76 So. 17.

CARRIERS — INJURY TO PASSENGER — EXCLUDING QUESTION.—Where it clearly appeared that the crowded condition of the car could not have contributed to the plaintiff's injury, it was proper to exclude the question asked by plaintiff's counsel: "Don't you think on that night if four trains failed to go and the passengers which would ordinarily go in those four trains were put into two trains, that extra cars should be put on to accommodate them?" Eaton v. New York, N. H. & H. Ry. Co. (Mass.), 116 N. E. 815.

PASSENGERS — INJURIES CAUSED BY MISCONDUCT OF FELLOW-PASSENGERS.—Plaintiff, a lady, boarded her train, and after she had gone up the car steps and reached the platform, a stout man came out of the car, throwing her against the brake wheel and holding her there several seconds before he passed down the steps. The Massachusetts court, in affirming a directed verdict for the defendant, said:

> "While there was evidence that the car which the plaintiff boarded was crowded, there was no evidence that there was any commotion or disturbance, or that anyone was pushing or crowding the stout man. If he was careless or ungentlemanly in his conduct, as the plaintiff contends, the defendant cannot for that reason be held liable for her injuries. A common carrier is not responsible for injuries to a passenger caused by the misconduct of others, which it could not have foreseen and guarded against."

Eaton v. New York, N. H. & H. R. Co. (Mass.), 116 N. E. 815.

INTERSTATE COMMERCE COMMISSION DECISIONS.

DUTY OF CARRIER TO TRANSMIT ROUTING INSTRUCTIONS—DEMURRAGE AND SWITCHING CHARGES REFUNDED ON ACCOUNT OF MISROUTING.

Bill of lading showed Schuh-Mason Lumber Company as consignor and consignee; destination as St. Louis, Mo., route "c/o Wabash R. R. North Market street"; and car number and initials A. C. L. 35391, shown to be correct. The Atlantic Coast Line turned this car over to the Mobile & Ohio but failed to note routing instructions on the waybill, and inserted 25391 as the car number. The shipment reached East St. Louis, Ill., on May 27, 1914, over the Mobile & Ohio, and notice of arrival was mailed to consignee as shown on waybill. Consignee had no office in St. Louis and did not receive the notice. The car was held by the Mobile & Ohio at East St. Louis during the free time; and no disposition being furnished, it was delivered to the Terminal Railroad Association, hereinafter called the terminal railroad, for placing on the public tracks in the Branch street yards, St. Louis, in accordance with tariff provisions. Notice of arrival was also mailed to consignee by this line, but it was not received for the reasons previously shown.

The terminal railroad and the Mobile & Ohio made repeated efforts to locate the Schuh-Mason Lumber Company but tracers sent out with exception of four sent prior to June 9, 1914, showed wrong car number. Showing of wrong car number in earlier and erroneous number in later tracers was not explained.

Complainant, assuming the shipment would reach East St. Louis over the Louisville & Nashville instructed that line on May 23, by wire and letter, to deliver it to Krug Lumber Company, St. Louis, Mo. A copy of the letter was sent to the agent of the Wabash at St. Louis. Complainant stated that the Krug Lumber Company, having allowed sufficient time for car to arrive, made repeated inquiries of the carriers at St. Louis and East St. Louis, including the terminal railroad, but none of them had any record of A. C. L. 35391. The car was held at the Branch street yards until July 22, 1914, when the terminal railroad discovered the error in the car number. On July 23, 1914, the Krug Lumber Co. ordered the car delivered to its plant on the Wabash, and delivery was promptly made.

HELD, That it was the duty of the Atlantic Coast Line Railroad to transmit the routing instructions and correct car number to its connection, and that the demurrage and switching charges involved were assessed as a result of its failure to do so. Schuh-Mason Lumber Co. v. Mobile & O. R. R. Co. et al., 46 I. C. C. 365.

ESTIMATED WEIGHTS ON ICED FISH IN BARRELS.

Charges on certain carload shipments of fish, packed in ice, in barrels, from Pensacola, Fla., to various interstate destinations were assessed upon the total estimated weight per package including the ice contained therein;

HELD, That such charges were unreasonable to the extent that they exceeded charges which would have accrued based on the weight per package exclusive of the ice contained therein. Warren Fish Co. et al. v. Louisville & N. R. R. Co. et al., 46 I. C. C. 375.

REFUSAL TO DESIGNATE AN "OFF-TRACK" FREIGHT STATION NOT A VIOLATION OF THE ACT TO REGULATE COMMERCE.

Complainant maintains and operates for defendant certain receiving and delivering stations at St. Louis, Mo. It alleges that a large number of shipments destined to interstate points were handled by it from one of its stations in St. Louis, which defendant had failed to designate in its tariffs; that defendant therefore refused to compensate complainant for handling this traffic; and that such refusal and failure to designate complainant's station in its tariff was unreasonable and unjustly discriminatory. Compensation for the services rendered is asked.

At time of movement defendant's tariff contained provisions for absorbing certain transfer charges to its St. Louis stations from designated off-track stations of the complainant and other transfer companies, but not including the station in question. The omitted station was later included with the other stations from which the transfer charges would be absorbed.

HELD, That it does not appear that defendant has violated any provisions of the act to regulate commerce. Columbia Transfer Co. v. Chicago, B. & Q. R. R. Co., 46 I. C. C. 371.

CONFLICTING RATES.

Complainant contends that defendants' failure to reissue the notation "Cancel. Rates named in item No. 400 of tariff (or as supplemented) will apply" automatically established a carload rate of 95 cents from Sebring and East Liverpool, Ohio, to San Francisco, and a carload rate of $1 from points of origin to Los Angeles, which had been previously canceled. While the failure to bring forward the notice of the cancellation was not strictly in accordance with Tariff Circular 18-A, the Commission found that such failure did not have the effect of automatically establishing the canceled rate. However, assuming that such failure did have the effect of publishing the 95-cent rate the Commission would still be constrained to hold that $1.15 was the legal rate, as a commodity rate once legally established remains in effect and is the only legal rate until canceled, notwithstanding a subsequently published conflicting rate. Jewel Tea Co., Inc., v. Pennsylvania R. Co., et al., 46 I. C. C. 314.

UNAUTHORIZED SERVICE.

Misrouting of a shipment resulted in excessive rates being assessed and demurrage charges accruing pending controversy over the matter. Defendant admits the shipment was misrouted for its own convenience.

HELD: the charges were imposed for and in connection with a service neither requested nor authorized and should therefore be refunded. Currie & Campbell v. Central R. R. of New Jersey, 45 I. C. C. 3.

PRESUMPTION OF ACCURACY ATTACHES TO TRACK SCALE WEIGHTS.

Charges were assessed on weights of 40,300 and 41,100 pounds. Complainants contend that the shipments actually weighed 40,000 pounds each. The shipments were not weighed by complainants, their statement as to weights being based solely on the fact that each of the shipments was invoiced to them as weighing 40,000 pounds; that each contained 320 bags and that experience had demonstrated that these bags uniformly weighed 125 pounds each. On the other hand, it was shown that the shipments were weighed on railroad track scales and the evidence offered by complainants held not sufficient to refute the presumption of accuracy which attaches to the track scale weights. Rankin & Company v. Chicago, M. & St. P. Ry. Co., 45 I. C. C. 132.

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—NEGLIGENCE.—Plaintiff's intestate was engaged in removing snow from the tracks, and as it was raining and freezing, the boss of the gang told intestate and the rest of the gang to go into a covered car for shelter. In going to the covered car they walked along the tracks, as this was the sole way of approach. While going to the covered car plaintiff's intestate was struck and killed by a passenger train which was considerably behind its schedule time. There was no warning that it was behind time. The case was submitted to the jury upon the question of the defendant's negligence. Swayze, J., in reviewing this point, said:

> "The failure of the engineer of the passenger train to blow a whistle until too late for any good does not indicate negligence, since he could not be supposed to anticipate that men would be walking on the track at that point. But we think that the failure to warn the men that the passenger train was behind time and might be expected is sufficient to sustain the verdict, since the jury might have believed the evidence that the boss told the men to go to the covered car, and that there was no way to go except along the track."

Armbrecht v. Delaware, L. & W. Co. (N. Y.), 101 Atl. 203. (See article in this issue of THE MEMORANDUM, first page).

CONTRIBUTORY NEGLIGENCE — CARETAKER OF NEW LOCOMOTIVE RIDING AS PASSENGER.—An employee of locomotive builders was accompanying new locomotives being hauled in a freight train, regular passenger fare having been paid for his transportation. The conductor of the freight train, upon being told by the caretaker that the engines had been "running hot" and that it would be necessary to examine and oil them, stated that the train would stop frequently for the purpose of dropping and picking up cars, and that in this way ample time would be afforded for examining and oiling the engines. Later when the train stopped the caretaker, without knowing why the stop was made and without informing the conductor of his action, got down and stepped upon the piston rod of his engine. The train started almost instantly, and he was injured. Judgment for the plaintiff was reversed, the court holding that his injury was attributable to his own negligence. Chesapeake & O. R. Co. v. Jones (Va.), 92 S. E. 820.

FOOD SURVEY ACT.

[PUBLIC—No. 40—65TH CONGRESS.]
(H. R. 4188.)

An Act To provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purpose of more effectually providing for the national security and defense and carrying on the war with Germany by gathering authoritative information concerning the food supply, by increasing production, by preventing waste of the food supply, by regulating the distribution thereof, and by such other means and methods as are hereinafter provided, the powers, authorities, duties, obligations, and prohibitions hereinafter set forth are conferred and prescribed.

SEC. 2. That the Secretary of Agriculture, with the approval of the President, is authorized to investigate and ascertain the demand for, the supply, consumption, costs, and prices of, and the basic facts relating to the ownership, production, transportation, manufacture, storage, and distribution of, foods, food materials, feeds, seeds, fertilizers, agricultural implements and machinery, and any article required in connection with the production, distribution, or utilization of food. It shall be the duty of any person, when requested by the Secretary of Agriculture, or any agent acting under his instructions, to answer correctly, to the best of his knowledge, under oath or otherwise, all questions touching his knowledge of any matter authorized to be investigated under this section, or to produce all books, letters, papers, or documents in his possession, or under his control, relating to such matter. Any person who shall, within a reasonable time to be prescribed by the Secretary of Agriculture, not exceeding thirty days from the date of the receipt of the request, willfully fail or refuse to answer such questions or to produce such books, letters, papers, or documents, or who shall willfully give any answer that is false or misleading, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both.

SEC. 3. That whenever the Secretary of Agriculture shall find that there is or may be a special need in any restricted area for seeds suitable for the production of food or feed crops, he is authorized to purchase, or contract with persons to grow such seeds, to store them, and to furnish them to farmers for cash, at cost, including the expense of packing and transportation.

SEC. 4. That the Secretary of Agriculture is authorized to cooperate with such State and local officials, and with such public and private agencies, or persons, as he finds necessary, and to make such rules and regulations as are necessary effectively to carry out the preceding sections of this Act.

SEC. 5. That the President, by and with the advice and consent of the Senate, may appoint two additional Assistant Secretaries of Agriculture, who shall perform such duties as may be required by law or prescribed by the Secretary of Agriculture, and who shall each be paid a salary of $5,000 per annum.

SEC. 6. That the President is authorized to direct any agency or organization of the Government to cooperate with the Secretary of Agriculture in carrying out the purposes of this Act and to coordinate their activities so as to avoid any preventable loss or duplication of work.

SEC. 7. That words used in this Act shall be construed to import the plural or the singular as the case demands, and the word "person," wherever used in this Act, shall include individuals, partnerships, associations, and corporations.

SEC. 8. That for the purposes of this Act, the following sums are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available immediately and until June thirtieth, nineteen hundred and eighteen: For the prevention, control, and eradication of the diseases and pests of live stock; the enlargement of live-stock production; and the conservation and utilization of meat, poultry, dairy, and other animal products, $885,000.

For procuring, storing, and furnishing seeds, as authorized by section three of this Act, $2,500,000, and this fund may be used as a revolving fund until June thirtieth, nineteen hundred and eighteen.

For the prevention, control, and eradication of insects and plant diseases injurious to agriculture, and the conservation and utilization of plant products, $441,000.

For increasing food production and eliminating waste and promoting conservation of food by educational and demonstrational methods, through county, district, and urban agents and others, $4,348,400.

For gathering authoritative information in connection with the demand for, and the production, supply, distribution, and utilization of food, and otherwise carrying out the purpose of section two of this Act; extending and enlarging the market news service; and preventing waste of food in storage, in transit, or held for sale; advise (sic) concerning the market movement or distribution of perishable products; for enabling the Secretary of Agriculture to investigate and certify to shipeprs the conditions as to soundness of fruits, vegetables and other food products, when received at such important central markets as the Secretary of Agriculture may from time to time designate and under such rules and regulations as he may prescribe: *Provided,* That certificates issued by the authorized agents of the department shall be received in all courts as prima facie evidence of the truth of the statements therein contained; and otherwise carrying out the purposes of this Act, $2,522,000: *Provided further,* That the Secretary of Agriculture shall, so far as practicable, engage the services of women for the work herein provided for.

For miscellaneous items, including the salaries of Assistant Secretaries appointed under this Act; special work in crop estimating; aiding agencies in the various States in supplying farm labor; enlarging the informational work of the Department of Agriculture; and printing and distributing emergency leaflets, posters, and other publications requiring quick issue or large editions, $650,000.

Provided, That the employment of any person under the provisions of this Act shall not exempt any such person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen.

It shall be the duty of the Secretary of Agriculture to submit to Congress at its regular session in December of each year a detailed report of the expenditure of all moneys herein appropriated.

SEC. 9. That the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act providing for an inspection of meats for exportation, prohibiting the importation of adulterated articles of food or drink, and authorizing the President to make proclamation in certain cases, and for other purposes" (twenty-sixth Statues at Large, page four hundred and fourteen), is hereby amended so as to authorize the Secretary of Agriculture, within his discretion and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, to permit the admission for immediate slaughter at ports of entry of tick-infested cattle which are otherwise free from disease and which have not been exposed to the infection of any other disease within sixty days next before their exportation from Mexico, South and Central America, the islands of the Gulf of Mexico and the Caribbean Sea into those parts of the United States below the southern cattle quarantine line at such ports of entry as may be designated by said joint regulations and also subject to the provisions of sections seven, eight, nine, and ten of said Act of August thirtieth, eighteen hundred and ninety: *Provided,* That the importation of tick-infested cattle from any country referred to in this section in which foot-and-mouth disease exists, which existence shall be determined by the Secretary of Agriculture, is prohibited: *Provided further,* That all cattle imported under the provisions of this section shall be slaughtered in accordance with the provisions of the Act of June thirtieth nineteen hundred and six (Thirty-fourth Statutes at Large, page six hundred and seventy-four), commonly called the meat inspection amendment, and the rules and regulations promulgated thereunder by the Secretary of Agriculture, and that their hides shall be disposed of under rules and regulations to be prescribed by the Secretary of Agriculture.

SEC. 10. That section six of the Act of Congress approved June seventeenth, nineteen hundred and ten, "An Act to provide for an enlarged homestead," be, and the same is hereby, amended to read as follows:

"SEC. 6. That whenever the Secretary of the Interior shall find any tracts of land in the State of Idaho, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible he may, in his discretion, designate such tracts of land, not to exceed in the aggregate one million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence upon the land entered: *Provided,* That the entryman shall in good faith cultivate not less than one-sixteenth of the entire area of the entry which is susceptible of cultivation during the first year of the entry, not less than one-eighth during the second year, and not less than one-fourth during the third year of the entry and until final proof: *Provided further,* That after six months from the date

of entry and until final proof the entryman shall be a resident of the State of Idaho."

SEC. 11. That the Secretary of the Interior is hereby authorized, in his discretion, to suspend during the continuance of this Act that provision of the Act known as the "Reclamation Act" requiring residence upon lands in private ownership or within the neighborhood for securing water for the irrigation of the same, and he is authorized to permit the use of available water thereon upon such terms and conditions as he may deem proper.

SEC. 12. That the provisions of this Act shall cease to be in effect when the national emergency resulting from the existing state of war shall have passed, the date of which shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the beginning of the next fiscal year after the termination, as ascertained by the President, of the present war between the United States and Germany.

Approved August 10, 1917.

CARRIERS—INJURY TO PASSENGER—STATUTORY EXEMPTION FROM LIABILITY TO ONE VIOLATING RULE.—A statute of New Jersey provides that if a passenger sustains injury "by reason of his going * * * on the platform * * * in violation of the printed regulations" which are posted in a conspicuous place in the car, the railroad company shall not be liable for the injury. The defendant company conspicuously posted at each end of its cars a notice reading, "PASSENGERS MUST KEEP OFF THE PLATFORM UNTIL THE TRAIN STOPS." Plaintiff, on defndant's train in New Jersey, after the station was called, but before the train stopped, went upon the platform, and was thrown to the ground in front of the station by a jerk of the train. The New York Appellate Division holds that defendant was not liable for plaintiff's injury, which occurred while plaintiff was deliberately violating a rule unmistakably forbidding his going onto the platform "until the train stopped." "If the statute means anything," said the court, "it permits this notice, and exempts defendant from liability for accidents from its violation. If the prohibition in the notice means anything, it prohibits the very act of the plaintiff which resulted in his injury." Kettell v. Erie R. Co., 163 N. Y. Supp. 640.

ASSUMED RISK—INJURY CAUSED BY DERAILMENT OF HANDCAR BY TOOL FALLING FROM BOX.—A section hand, with his foreman, was riding on a motor-driven hand car on which there was a box to hold tools. The section hand was sitting on the front of the car, with his foot hanging down, while the foreman was in the middle of the car operating the motor, when a track wrench fell from the front end of the car, derailing it and injuring the section hand. There was no evidence as to whose duty it was to see that the tools were properly loaded on the car and that they did not fall off. They were loaded and carried as usual, and no tools had ever before fallen off under similar conditions. Considering the duties and the respective positions of the men on the car at the time of the accident, the court held that the fault in failing to observe that the wrench was about to fall was attributable to the section hand rather than to the foreman; that there was no negligence, and that the section hand assumed whatever risk there was in riding on the car. A judgment for the defendant was affirmed. Kalivas v. Northern Pac. R. Co. (Wash.), 165 Pac. 96.

RAILROADS—PARTIES ENTITLED TO LIENS—CONTRACTORS.—Rev. St. 1911, Article 5621, Texas Statutes, providing for a lien for any person or firm, lumber dealer or corporation, artisan, laborer, mechanic or sub-contractor who may labor, or furnish materials, etc., for improvement or repair of any building whatsoever, and giving to one who may furnish any material for the construction or repair of any railroad a lien for services rendered in constructing the roadbed or laying out the railroad of a railroad company. HELD: to create a lien only for materials furnished. San Antonio, U. & G. Ry. Co., et al. v Hales (Tex.), 196 S. W. 903.

NEW TRIAL—ABUSE OF DISCRETION.—On motion for a new trial for misconduct of jurors in an action for personal injury, the jurors were examined and their testimony showed that it was discussed among them that plaintiff's attorney would get a larger fee and one of the jurors admitted to have considered it in his verdict. HELD: It was an abuse of discretion of trial court to overrule the motion. St. Louis, S. W. Ry. Co. of Texas v. Roberts (Tex.), 196 S. W. 1004.

OFFICE NOTES AND COMPILATIONS OF AUTHORITIES.

EDITORIAL NOTE.—In the course of the work of the staff of the General Counsel, a large number of legal notes and compilations of authorities have been prepared from time to time. It is proposed to publish some of this material in this column of THE MEMORANDUM for the purpose of preserving it in convenient form and for the benefit of counsel. It will be printed as of the date of preparation.

REVIEW OF AUTHORITIES ON CONTRIBUTION BETWEEN JOINT TORT-FEASORS.

Some time ago you requested us to investigate whether we could recover over against the shipper who piled the ties so close to the track that Marshall was struck by them—your idea being that if we could notify the shipper to come forward and defend the suit the jury would get the idea that the shipper, and not the Company, ultimately would have to pay the verdict and be inclined thereby to make it considerably less.

We have investigated the question somewhat, and we believe the true doctrine to be that where a judgment is recovered in tort against two or more defendants jointly, and the act which is the basis of the suit is not unlawful *per se*, a party who has been guilty of only technical or constructive fault may recover not only contribution but indemnity against the party whose fault caused the injury.

Thus in the leading case of Bailey v. Bussing, 28 Conn. 455, a judgment was recovered in tort against three defendants jointly interested in the running of a stage for an injury caused to a traveler upon the highway by the negligence of *one* of the defendants who was driving. One of the other defendants was compelled to pay the whole amount of the judgment and brought an action against the defendant whose negligence had caused the injury, for contribution. The Court held that he was clearly entitled to contribution and strongly intimated that he was even entitled to full indemnity.

In Trustees of Village v. Foster, 30 N. Y. Supp. 686, a vault covered by a grating in the sidewalk was constructed by the owner of abutting premises, and a person injured thereby sued and recovered against the Village, whereupon the Village in turn sued the abutting owner for indemnity. HELD, that the Village was entitled to recover the amount it was compelled to pay to the person who was injured by the defective condition of the sidewalk. The Court said there were exceptions in two classes of cases to the general rule which denies indemnity or contribution to wrong-doers: (1) Where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent man is held to respond to the tort of his servant; and (2) where both parties have been in fault, but not in the same degree, towards the person injured, and the fault of the party from whom indemnity is claimed is the primary and efficient cause of the injury.

In Gray v. Boston Gas Light Co., 114 Mass. 149; 19 Amer. Rep 324, the defendant fastened a telegraph wire to the plaintiff's chimney without permission. The weight of the wire pulled the chimney into the street and injured a traveler who brought action against Gray, the owner of the building. Notice of the suit was given to the Gas Llight Co., but it refused to defend. Subsequently Gray paid the injured party a certain sum in settlement of the damages demanded by him, and sued the Gas Light Co. to recover that sum and the expenses of the litigation. HELD, the sum paid in settlement being reasonable, Gray was entitled to recover it together with the expenses of the action of the traveler against him. The Court said:

> "When two parties, *acting together*, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *particepes criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable."

Churchill v. Holt, 127 Mass. 165; 34 Amer. Rep. 355, is to the same effect.

In City of Brooklyn v. Brooklyn, &c., R. Co. 47 N. Y. 475; 7 Amer. Rep. 469, the rule of liability is thus stated:

> "Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damages paid by reason of the offense in which both were concerned in different degrees as perpetrators."

In Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461; 30 Amer. St. Rep. 685, the lessor of a wharfage pier was sued and made to pay for injuries sustained by an employee of the lessee, the injury being caused by the carelessness and negligence of the lessee. The employee recovered $2,000 and odd dollars damages against the lessor of the pier, and the lessor expended $700 and odd dollars in defending the action. The lessor then sued the lessee to recover these two sums. HELD, the lessor was entitled to recover both sums.

The Court, after citing numerous cases, including some of the cases hereinbefore referred to, said:

> "Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence; and if another has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."

See also Note to 16 Amer. St. Reports, at page 254, where the Annotator says that even in the case of *active* torts the rule that one of several joint tort-feasors cannot enforce contribution from the others is applicable only against the one who was himself in fault, and that if the act for which recovery has been had was not ordinarily or necessarily *unlawful*, and the person seeking contribution or indemnity did not in fact *intend* any wrong, and the act and the circumstances are not such that he must be presumed to have intended a wrong, then he may recover.

In Thweatt v. Jones, 1 Rand. (Va.), 328, HELD that one tobacco inspector against whom a judgment had been recovered for failing to deliver tobacco when legally demanded, might recover contribution *in equity* against his co-inspector when the failure to deliver the tobacco did not proceed *ex maleficio;* that the mere non-performance or violation of a civil obligation is not such a wrong as will condemn a claim to contribution; that the act which precludes a party from the right to claim contribution from those who are *equally* liable to the burden with himself must be *malum in se*, as actual fraud or voluntary wrong.

In Chicago v. Robbins, 67 U. S. 418 (17 L. Ed. 298) HELD that a municipal corporation having exclusive care and control of its streets is obliged to see that they are kept safe for the passage of persons and property, and that if this duty is neglected and anyone is injured it is liable for the damages sustained; but that it has a remedy over against the party that has so used the streets as to produce the injury unless it (the municipal corporation) was also a wrongdoer; that because the city is liable to a sufferer by the insecure state of the streets is no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful acts.

In Washington Gas Co. v. District of Columbia, 161 U. S. 327 (40 L. Ed.718) HELD the District could recover from the Gas Co. damages adjudged against the District for injury caused by a defective gas box.

By reference to Rose's Notes to Chicago v. Robbins, *supra*, it will be seen that the cases bearing on the question under consideration are almost innumerable.

But it may be contended in this case that Marshall was injured by the actual negligence of two several wrong-doers contributing to his injuries, and that the rule in such cases is that neither has any right to demand that he shall be indemnified by the other for what he may be compelled to pay to the person injured. Thus in Central Ga. R. Co. v. Macon R., &c., Co. (Ga.), 71 S. E. 1076, it appeared that an electric light company maintained wires in a railway company's yard to supply the latter with light. An electric wire sagged against a steel cable fastened to a coal chute of the railroad company, and because of inadequate or defective insulation the current leaked from the wire to the cable and an employee of the railroad company was killed

by coming in contact with the cable. Recovery was had against the railway company. HELD, on the authority of Union Stock Yards Co. v. Chicago R. Co., 196 U. S. 217 (49 L. Ed. 453) that on account of the *actual concurring negligence of both companies,* though that of the electric company was first in existence, the electric company was not liable to indemnify the railroad company. The Court said that the law imposed upon both companies a joint and several duty to see that the yards were kept in a reasonably safe condition; that the railway company had no right to allow the light company to instal or maintain wires in the yard except on the condition, applicable alike to each of the companies, that reasonable care would be taken to safe-guard employees from injury through them; that the judgment against the Railroad company for the employee's death was a conclusive finding that it allowed the wires to be installed in a negligent manner in the first instance, that it was neglectful in allowing them to remain where they were and that one or both of these things was the proximate cause of the death of the employee; that the railroad company was suing the light company, not from any breach of any contract on its part to instal the wires in a proper manner or to properly maintain them and inspect them, but on the theory that the light company was guilty of substantially the same tortious delinquency that the railroad company itself had committed.

We deduce from the weight of authority that the rule, that there is no right to indemnity between wrongdoers, applies in negligence cases based on willful wrongdoers—not cases growing out of the breach of mere legal duties and obligations—and that, in the latter cases, a distinction must be drawn between the liability of the person primarily negligent and that of one only secondarily negligent. And it seems to be well settled that the person *secondarily* liable in such cases has a right to indemnity from the person *primarily* negligent. Numerous recent cases recognize this exception to the general rule. Many of them will be found cited in Annotated Cases 1913 B, page 942.

It is difficult to reconcile the doctrine of *primary* and *secondary* negligence with the doctrine of proximate and remote cause. It would seem, when it is once established that a defendant is guilty of only secondary negligence, and that another person is guilty of primary negligence in respect to the plaintiff's demand, that the defendant should be exonerated under the doctrine of proximate cause. But it seems that plaintiff who has suffered injury may have the right to sue two persons as joint wrongdoers as to him, who, among themselves, are not joint wrongdoers at all, and that if the plaintiff in such case recovers against one wrongdoer, who as between himself and a third person was only *secondarily* negligent, the defendant, on satisfying the recovery, may recover over against the person *primarily* negligent.

Thus in Pullman Co. v. Cincinnati, &c., R. Co. (Ky.), 144 S. W. 385, it appeared that a car manufacturing company sold and delivered to a railroad company a car the shaft of which was defective; and that an employee of the railroad company was injured by the breaking of the shaft and recovered judgment against the railroad company on account of its negligence in not discovering the defect; and it was HELD that the railroad company was entitled to indemnity from the car manufacturing company. The Court said that while the railroad company was negligent, its negligence was *secondary;* that the negligence of the car manufacturing company created the danger and the negligence of the railroad company consisted only in failing to discover it.

In Scott v. Curtis (N.Y.), 98 N. E. 794; 133 Amer. St. Rep. 811, a coal dealer in delivering coal was negligent in leaving off the cover of the coal chute in the sidewalk, and the owner of the premises was held liable to a pedestrian who fell into the hole. It was held that the owner could recover over against the dealer upon the ground that the latter was *primarily* negligent.

In Walton, Whitten & Graham v. Miller, 109 Va. 210, a freight train upon which the plaintiff's intestate was employed collided with earth and rocks thrown upon the track by a blast set off by a firm of contractors who were engaged in widening the roadbed for the purpose of double-tracking. HELD, both the railroad company and the contractors were liable, the Court saying that the railroad company could not divest itself of the duty of keeping its track in good and safe condition and free from obstructions by the intervention of an independent contractor.

The trial court, in the last cited case, by the instructions it gave, practically absolved the railroad company from liability, but the railroad company seems to have based its claim to absolution upon the narrow and untenable

ground that it had let the work to *independent contractors* of good reputation and standing. The railroad company in that case, it seems to us, might have emerged from the suit with the right to indemnity against the contractors if its case had been properly managed.

In Risque v. C. & O. R. Co. 104 Va. 476, the plaintiff's intestate was an employee of the Allegheny Ore & Iron Company and was injured in a collision with a passenger train of the C. & O. Ry. Co. He sued the railway company, and in one or more counts of his declaration he charged that the railway company was guilty of negligence in furnishing the Iron Co. cars without brakes, in consequence of which defect the collision occurred. The Court sustained a demurrer to these counts on the ground that the injured party's remedy for the defective cars was against the company *whose servant he was,* who owed him the duty of inspecting the cars before using them, or of declining to receive them, or of remedying the defect—there being no relation of employer and employee between the railroad company and the injured person.

On the other hand, in Standard Oil Co. v. Wakefield, 102 Va. 824, the Court held that a person negligently causing or authorizing the use by another of a dangerous instrument, under such circumstances that he knows or should know are likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself at fault; that such liability *does not depend upon privity of contract,* but arises from a general duty to the public.

Marshall would seem to be entitled to recover in his suit against the Company. See Smith's Admr. v. N. & P. Traction Co. 109 Va. 453, in which the Court quotes Choctaw, &c., Co. v. McDade, 191 U. S. 64, and Texas Pacific Co. v. Swearingen, 196 U. S. 51, to which two U. S. cases you referred us some time ago. See also N. & W. R. Co. v. Cheatwood—a case in which the plaintiff was crushed between a sand-house and the tender of an engine on which he was riding.

It seems to us that the only possible defence open to us is to *invert* the doctrine of *last clear chance,* and undertake to maintain that although the Company may have been guilty of negligence in permitting the ties to be piled too close to the track, nevertheless that the plaintiff, after becoming aware of the defendant's negligence in this respect, had the *last clear chance* to prevent the accident.

As the case will be governed by the Federal statute, and as contributory negligence is thereby eliminated as a defence *in bar,* we will have to undertake to maintain that the doctrine of *last clear chance* is not affected by the Federal statute, as that doctrine is predicated upon the doctrine of *proximate cause.* If Marshall saw, or by the exercise of due care on his part should have seen, the proximity of the ties to the track in time to have saved himself from injury, then under the doctrine of *last clear chance (inverted)* his own negligence was the *proximate* cause of the accident, and the negligence of our Company was a remote cause. On this hypothesis the negligence of the plaintiff and defendant did not *concur.* The plaintiff's negli- (supposing he was negligent) was not contributory (concurring) but was the intervening *proximate* cause of the injury. From the plaintiff's statement of his case in his declaration it seems very likely that he was negligent, and by a cautious cross-examination of him we may develop that he had the *last clear chance* to save himself.

The plaintiff may fail to show *how long* the ties had been too close to the track, and, if so, it may be that he will thereby fail to show actionable negligence on the Company's part. See Sou. Ry. Co. v. Newton, 114 Va. 114.

March 23, 1915.

Assumption of Risk—Passenger Obeying Direction of Trainman.—A passenger was seated in a safe place in a coach when a member of the train crew called out to the passengers directing them to go into the car ahead. Plaintiff picked up his traveling bag and some bundles and went upon the platform. According to his testimony, the train was going so fast that he was afraid the car would jump the track or break its coupling, and he was thrown from the platform as the train was rounding a curve. In an action for his injuries the New Jersey Supreme Court held that he had assumed the risk of an obvious danger, and that defendant was not liable, as a passenger is under no obligation to obey instructions of the railroad or its agents where obedience will subject passenger to great and obvious danger, and a passenger who obeys with knowledge of danger assumes the risk of injury. McGrath v. Delaware, L. & W. R. Co. (N. J.), 100 Atl. 753.

INVALIDS AS PASSENGERS—PERMIT TO USE BAGGAGE CAR.—A regulation of a railroad company provided that sick or injured persons on cots or stretchers, accompanied by an attendant, might ride in the baggage car on orders from the superintendent. Plaintiff, a paralytic, obliged to use an invalid's chair, bought a round trip ticket and rode in the baggage car in his chair to his destination without having obtained a permit from the superintendent. On his return he was not allowed to ride in the baggage car and sued for damages, alleging that he made five or six similar trips a year for ten years, and had obtained a permit only twice. The Texas Court of Civil Appeals held that the fact that he had been so allowed to ride was an accommodation merely, which could be discontinued at any time, and to the continuance of which plaintiff had no legal right. Missouri, K. & T. R. Co. v. Nelson (Tex.), 195 S. W. 1176.

MASTER AND SERVANT—PRESUMPTIONS—INFERENCE—RES IPSA LOQUITUR.—In an action by employee against master for injuries suffered while in his employment, there is no presumption of negligence, and the maxim *res ipsa loquitur* does not apply, the maxim operating in consequence of presumption and not of inference. In the case of a "presumption" the given evidential fact is vested with certain consequences touching the further production of proof, and being an "inference" to which definite legal consequences attach. An "inference" is not a presumption, but a deduction from the facts proven. Mathews v. Alabama Great Sou. R. Co. (Ala.), 76 Sou. 17.

RAILROADS—CROSSINGS — INJURY — EVIDENCE.—Plaintiff was killed while crossing railroad tracks at a station. The trial court admitted evidence that after the accident the fence was erected between the inbound and outbound tracks at the station to prove defendant's negligence. HELD: The evidence was not admissible to prove the negligence of the defendant, but only for the purpose of showing that it was physically and practically possible to build such a fence in the conduct of defendant's business when defendant contends it was impossible or impracticable, which was not so in this case. Conry v. Boston & M. Ry. Co. (Mass.), 116 N. E. 733.

RAILROADS — CROSSING — CONTRIBUTORY NEGLIGENCE.—Plaintiff's intestate approached a railroad track while intently looking at light on caboose of freight train which was passing. He did not observe a passenger train coming from the direction in which the freight train was headed, but, instead, walked to a point in such close proximity to the passing passenger train that he was struck and killed by the steam chest projecting from the side of the boiler. Evidence showed that the proper crossing signals were given by the engineer, and that the intestate had an unobstructed view. It was held that plaintiff's intestate was guilty of negligence, continuing and concurring with whatever other negligence there may have been as a contributing cause of the accident, which precludes recovery by his relatives. Tucker et ux. v. Illinois Cent. R. Co. (La.), 76 So. 212.

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THE MEMORANDUM

Vol. III No. 4

LAW DEPARTMENT NOVEMBER, 1917. SOUTHERN RAILWAY COMPANY

THE TWENTY-EIGHT-HOUR LAW AS CONSTRUED IN PENAL ACTIONS.

No attempt will be made in these notes to collect the authorities relating to the effect of the Act, or the violation thereof, on the liability of the carrier to the owner of the stock; nor the cases in the state courts where the law has been construed incidental to the determination of actions for loss or damage. The scope of the notes is to determine the liability of the carrier to the United States for the penalty. As only one penalty of the maximum amount of $500 is usually involved in the cases there is seldom an appeal to the United States Supreme Court.[1] The result is that the different lower courts have construed certain provisions of the law variously and these divergent views have not been harmonized by higher authority.

SCOPE OF THE ACT.

The Act in full is appended below. Briefly summarized it prohibits the confinement of interstate shipments of cattle, sheep, swine, or other animals in cars or vessels for more than twenty-eight consecutive hours without unloading into suitable pens for rest, feed and water for at least five consecutive hours, unless such unloading is prevented *"by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight."* The limit of confinement may, however, be extended to thirty-six hours upon the written request of the owner or person in charge of the stock, but such request must be *"separate and apart from any printed bill of lading, or other railroad form."* In the case of sheep it is specially provided that it shall not be required that they be unloaded in the nighttime, but where the time limit (*i. e.* 28 hours) expires in the nighttime they may continue in transit to a suitable place for unloading "subject to the aforesaid limitation of thirty-six hours." The carrier who "knowingly and willfully" fails to comply with the provisions of the statute is made liable to a penalty of not less than one hundred nor more than five hundred dollars. Where the animals are carried in cars or vessels in which they can and do have proper food, water, space and opportunity to rest, the requirement that they be unloaded is dispensed with.

TO WHOM DOES THE ACT APPLY?

By its terms the law applies to any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which the animals shall be conveyed from one State into or through another State, treating the Territories and the District of Columbia as States, and to the owners or masters of any vessel transporting them from one State into or through another State. In the former statute receivers were not mentioned and it was held that they were not subject to the Act since penal laws must be strictly construed.[2]

It has been held in many cases that terminal railroad companies are embraced by the Act,[3] though they issue no bills of lading and receive no part of the through freight rate, doing only switching service for the trunk lines or for industrial plants on their lines.[4] It is

[1] Judicial Code § 241. Baltimore & O. S. W. R. Co. v. U. S., 220 U. S. 94.

[2] U. S. v Harris, 177 Fed. 305.

[3] Northern Pac. Term. Co. v. U. S. (Ore.), 184 Fed. 602; St. Joseph's Stockyards Co. v U. S. (Mo.), 187 Fed. 104.

[4] U. S. v. Sioux City Stock Yards (Ia.), 162 Fed. 556; U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625; U. S. v. Nor. Pac. Term. Co. (Ore.), 181 Fed. 879; U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724.

no defense that such terminal carrier acts merely as the agent of the line haul carrier.[5] In U. S. v. Union Pacific R. Co.,[6] however, it was held that the initial carrier could not escape liability by showing that it had delivered the shipment to a terminal company within the time limit, it appearing that the terminal company was not an independent carrier and did not hold itself out to the public as such, but acted merely as an agency of the several line carriers against whom it charged up its expenses in proportion to the service rendered to each. The court held that the initial carrier's responsibility did not end until it had delivered the shipment to the next connecting (*i. e.* line haul) carrier.

It has been suggested that a terminal company or other carrier which does not move the stock towards their destination but merely receives them from a line carrier for the purpose of carrying them to the pens for unloading, feed and water, and then returns them to the line carrier at the point where it received them is not subject to the Act, since such movement is a diversion from, and not a part of, the carriage from the point of origin to final destination. This point was raised but not decided in U. S. v. Stockyards Terminal Co. (Minn.), 178 Fed. 19. There seems to be little basis in the language of the statute to support such a position.

Shipments Subject To The Act.

All interstate shipments are governed by the Act, including a shipment between two points in the same State if the route lies through another State; but such a shipment passing en route through Canada or Mexico is not subject to the Act. But where a shipment from a point in one State to a point in another State passes through Canada it is held to be subject to the Act and the time consumed in Canada may be counted in computing the lawful period of confinement. Such construction of the Act does not make it invalid on the ground of extraterritoriality. In U. S. v. Lehigh Val. R. Co. the court said on this point:[7]

> "It is urged in behalf of the defendants that, if the time occupied in the transportation of the cattle through Canada is included in computing the period of detention, the effect will be to give to this law an extraterritorial force. The general rule is, of course, fundamental that the penal laws of one country have no force in another country. But, in my opinion, that rule has no application in these cases. The offense with which these defendants are charged is continuing the confinement of the cattle in this State after the term of confinement permitted by the statute has expired. It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement, part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence."

Upon the same principles the carrier was held guilty where the time limit expired while the shipment was in Canada, the defendant's default having been that it continued the confinement for an hour after the stock had reentered the United States.[8] It is clear that the law has no application to a movement entirely within the limits of one State or Territory, and it was so held under the old law.[9]

Kind of Animals.

The statute says, "cattle, sheep, swine or other animals." It has been held that horses and mules are embraced by the words "other animals."[10] In the case reported 18 Fed. it is intimated that the law is limited to quadrupeds, and in the Virginia case it is pointed out that the statute is primarily humane, as indicated by its title, rather than a sanitary regulation, hence, the phrase, "other animals," should be held to include all animals that might be shipped in crowded cars or boats and which would suffer in like manner with cattle, sheep and swine, for the want of food, water, or rest. Both cases hold that the statute is not restricted to animals used for food.

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[5] U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947.

[6] 213 Fed. 332 (Utah).

[7] U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971.

[8] Grand Trunk Ry. Co. of Canada v. U. S. (N. Y.), 191 Fed. 803.

[9] U. S. v. East Tenn. V. & S. R. Co. (Tenn.), 13 Fed. 642; U. S. v. Louisville & N. R. Co. (Tenn.), 18 Fed. 480.

[10] U. S. v. L. & N. R. Co., 18 Fed. 480; C. & O. Ry. Co. v. American Ex. Bk., 92 Va. 495, 44 L. R. A. 449; Baltimore & Ohio S. W. R. Co. v. U. S. 220 U. S. 94.

When Unloading Not Required.

Section 3 provides that "when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." In the first case arising under this section it was intimated by the court that the cars provided need not be sufficiently large to permit all the cattle to lie down at the same time[11]; but it was later held to the contrary by the Circuit Court of Appeals, the court observing that it would be difficult to arrange an agreement among the cattle to take turns at lying down.[12] It is not enough, however, for the carrier to show that the stock had sufficient space in the car, and that the caretaker had undertaken to see that they were properly fed and watered and had been given the opportunity to feed and water them. The animals must actually have had proper food and water.[13] Lack of knowledge that they were not receiving proper attention is no defense to the carrier. Where the shipment was in patent cars provided with pans for watering, the carrier is guilty if it fails to water them for 28 hours, or if the pans were so constructed that they were tipped up and spilled the water so that some of the cattle could not get any.[14]

When Period Begins and Ends.

The statute provides that in estimating the time of confinement the time consumed in loading and unloading shall not be considered. Does this mean that the time begins to run as to a particular animal from the time it is loaded into the car, or that the time begins on the whole carload from the time loading of the car is complete? Suppose there are several carloads belonging to one or more shippers and consigned to one or more consignees, being loaded concurrently at the same station for the same train. Does the time begin to run on each car from the time its loading is complete, or is each shipment to be considered separately, or may the loading of all the stock be regarded as one transaction? These questions are answered in Baltimore & O. S. W. R. Co. v U. S.,[15] holding in such case that the loading of all the cars may be considered as one act if it be not discontinuous or unduly prolonged, so that the time would begin to run from the completion of loading of the last car. The fact that the ownership of the stock is in different persons is immaterial. And even where cattle were loaded at different stations within a few minutes of the same time, and the cars consolidated into one train, it has been held that—to use the language of the court[16]—"there was practically but one offense, and the slight difference in the time when the lawful period expired is insignificant, and therefore, giving the statute a reasonable construction, may be disregarded."

Since time consumed in unloading is not to be counted the statute is satisfied if the unloading is commenced within the time limit, subject to the condition implied in the Baltimore & Ohio Southwestern case, supra, that the process of unloading must not be discontinuous or unduly prolonged. The law puts the responsibility primarily on the carrier to see that the stock are unloaded within the prescribed time. Hence where the caretaker told the carrier's agents that he would find the consignee and tell him that the car was ready to be unloaded, and have him unload it, the carrier must still show that it used reasonable diligence to have the car unloaded within the time limit.[17] Where the defendant initial carrier delivers the shipment to connecting line within the time limit it would seem that it does not incur liability for the penalty though the connecting line should fail to unload within the required time, and it has been so held in a case where it appeared that the connecting line received the shipment in sufficient time to have carried it to the stockyards and unloaded it within the time limit.[18] The question of whether the connecting line had time enough to unload within the time limit would seem to be immaterial, however, since the de-

[11] U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 186 Fed. 541.

[12] Erie R. Co. v. U. S. (N. Y.), 200 Fed. 406; U. S. v. Erie R. R. Co. (N. Y.), 191 Fed. 941; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

[13] Chicago, B. & Q. R. Co. v. U. S. (Neb.), 195 Fed. 241; U. S. v. N. Y. C. & H. R. R. Co. (N.Y.), 191 Fed. 938.

[14] U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 186 Fed. 541. **Note.**—The evidence in these patent car cases indicated that the minimum space requirement for large cattle was a width of 2½ feet per head, that being the requirement of law regulating carriage of livestock on vessels.

[15] 220 U. S. 94; 55 L. Ed. 384.

[16] U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

[17] Ore.-Wash. R. & N. Co. v. U. S. (Idaho), 205 Fed. 337.

[18] Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15.

fendant did not confine the stock beyond the lawful time and the Act does not make it liable for default of succeeding lines. The protection of the latter in such case is in their right to refuse to receive the stock if they cannot do so without violating the law. The true distinction would seem to be whether the succeeding line is an independent carrier or a mere agent of the defendant. This aspect of the matter is not discussed in the case cited, but in another case[19] it was held that the initial carrier could not excuse itself by showing delivery to a terminal company within the time limit, where such terminal carrier was not an independent carrier holding itself out as such to the public, but a mere agency of the trunk lines, which contributed to the expense of maintenance of the terminal company in proportion to the service it rendered to each. The court held the initial carrier was liable for the default of its agent the terminal company, which was employed by it and not by the shipper. In the court's opinion the first carrier's liability does not end until the shipment is delivered to the next connecting (*i. e.* line haul) carrier.

A carrier receiving a shipment already confined beyond the limit and carrying it with due diligence to its pens, convenient to the junction point, for unloading has been held not liable for the penalty on the ground that its handling of the stock was a part of the unloading,[20] but the contrary has also been held in a case where it is said that the time spent in unloading embraces only that space of time required in putting the animals off the car.[21] In most of the cases the question of liability under such circumstances is made to depend on whether the carrier acted knowingly and willfully.

Delivery to the consignee within the time limit ends the liability of the carrier. Thus where the bill of lading called for delivery on the consignee's private track, but custom required that the cars be placed opposite a runway on the track which was the only practicable place for unloading them, the carrier is not liable if it places a car of stock at the runway and notifies the consignee before the expiration of the time limit, though the consignee fail to unload within the prescribed time; but mere placing of the cars on the side track at a point not opposite the runway is not a complete delivery and the carrier is liable if the stock are confined overtime. It is no defense that there was a car at the runway being unloaded when the car in question arrived.[22] There are cases where the cars were placed at consignee's pens after business hours[23] or during a storm,[24] but as these decisions seem to turn on the question of willfulness rather than on whether there was a good delivery they will be considered under that head.

Unloading In Transit.

The law prohibits the confinement of stock in cars or boats "for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours." Suppose the stock are confined first in cars twenty-five hours then unloaded into pens, but such unloading is not in compliance with the statute because not done in a humane manner, or the pens are not suitably equipped, or the stock are not fed or watered, or because they are not allowed to remain in the pens five hours before being reloaded into the cars and sent on their way. What is the situation? Is an offense committed as soon as the twenty-eight-hour period counting from the time of first loading has elapsed? The general purpose and spirit of the Act suggest that this question be answered in the affirmative, but since the statute is penal familiar rules of construction require that it be construed strictly in favor of the defendant, and the correct view on principle is believed to be that in the case stated the carrier is not liable unless and until the confinement *in the cars* exceeds the prescribed time. To violate the law the stock must be confined in *cars* or *vessels* over twenty-eight *consecutive* hours and the Act itself provides that it is its intent "to prevent their *continuous* confinement" beyond the twenty-eight-hour period. In the hypothetical case they are not confined in cars or vessels for twenty-eight consecutive hours. It

[19] U. S. v. Union Pac. R. Co. (Utah), 213 Fed. 332.

[20] U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971; U. S. v. Delaware, L. & W. R. Co. (N. Y.), 206 Fed. 513; St. Louis, M. B. & T. Co. v. U. S. (Ill.), 209 Fed. 60.

[21] U. S. v. Nor. Pac. Term. Co. (Ore.), 181 Fed. 879.

[22] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 206.

[23] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207.

[24] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211.

may well be held that the consecutiveness or continuousness of the confinement cannot be broken within the meaning of the Act except by unloading in the manner prescribed, but it is difficult to see how the time the animals are in pens can be counted as a part of the offense of confining them *in cars* beyond the lawful period. This question is not fully answered by the decisions. The point was clearly raised in U. S. v. Lehigh Val. R. Co.,[25] but the court refused to decide it and disposed of the case on other grounds. The opinion of the trial court is quoted, however, which accords with the writer's view. The facts in the case were that the animals had been unloaded into the pens after twenty-one hours' confinement and had remained in the pens twelve hours, but without feed, and had then been loaded on a barge and confined thereon four hours and forty-five minutes.

Other decisions seem to take the view, without clearly stating it, that the carrier is not entitled to deduct the time the animals may have been in pens en route, unless their unloading therein is in conformity with the statute. Thus where the carrier unloaded the cattle within the time limit, but only for three hours, and then reloaded and forwarded them, it was held to have incurred the penalty upon the expiration of the time limit counting from the time of the first loading without any allowance for the three hours.[26] And where the carrier confined the stock in cars overtime, and then unloaded them for only three hours, it was held to have twice violated the Act and rendered itself liable for two penalties. It was no excuse that the owners requested that only three hours' rest be allowed or that it was only a very short run to final destination.* The holding that the failure to rest the stock five hours in the pen as prescribed by the statute constituted a violation of the law would seem to be clearly erroneous since the statute prohibits only the excessive confinement of stock in cars or vessels. Where the railway company has provided itself with proper pens, suitably located and sufficient for the reasonable accommodation of traffic, it cannot be held liable where, in order to avoid confining cattle in the cars overtime, it is compelled, on account of various delays which could not have been expected, to unload them in pens at an intermediate station not properly equipped, since its act though knowingly done is not willful.[27]

Thirty-six-Hour Release.

The limit of confinement is 28 hours except "that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours." Such release when executed is one of the "contingencies hereinbefore stated" which excuses the carrier for confining the stock beyond the statutory twenty-eight-hour period.[28] The request may be made by the owner or by an agent to whom he has intrusted the shipping of the livestock, and may be made either before the movement commences or during transportation; it need not be induced by any unforeseen contingency. It may be on a railroad form provided such form is separate and apart from the bill of lading or any other railroad form. A request partly in printing and partly in handwriting is good.[29] A special written request must be made for each shipment. General written instructions from the shipper applicable to all future shipments, though confirmed orally as to the particular shipment do not constitute a compliance with the law.[30] It has been held, however, that the Act does not require the request to be on a virgin sheet, for, says the court, the law "requires the separateness of the request as a request and not the separateness of the paper or material on which it is written." Applying these principles, a request written on the bottom of the waybill and signed by the shipper

[25] (N. J.), 204 Fed. 705. The interpretation suggested as the proper one would be in large measure destructive of the Act and probably would not be sustained by the Supreme Court. Balto. & O. R. Co. v. Pitcairn, 215 U. S. 481; Tex. & P. Ry. Co. v. Abilene, 204 U. S. 426.

[26] U. S. v. New York C. & H. R. R. Co. (N. Y.), 221 Fed. 1000.

* U. S. v. Delaware, L. & W. R. Co. (N. Y.), 220 Fed. 944.

[27] St. Louis & S. F. R. Co. v. U. S. (Mo.), 169 Fed. 69.

[28] U. S. v. Pere Marquette R. Co. (N. Y.), 171 Fed. 586.

[29] Wabash R. Co. v. U. S. (Mo.), 178 Fed. 5; Atchison, T. & S. F. R. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15 (The sufficiency of the request is for the determination of the court).

[30] U. S. v. Pere Marquette R. Co (N. Y.), 171 Fed. 586.

was held to be sufficient.[31] An agreement between the carrier and shipper to confine the stock over thirty-six hours is void and affords the carrier no protection even in a civil action by the shipper for damages.[32]

Sheep.

The effect of the special proviso as to sheep is not to authorize their confinement in any case beyond thirty-six hours, but merely to permit the carrier, without any release from the shipper, to continue their confinement until they reach a suitable place for unloading, but not exceeding thirty-six hours where the twenty-eight-hour period expires in the nighttime.[33] Where it is obvious that the thirty-six-hour period will expire in the nighttime it is the duty of the carrier to unload before dark.[34]

Connecting Carriers.

The courts are divided in their construction of the law as applied to movements of live-stock over the lines of connecting carriers. The weight of authority, and as it seems to the writer, of reason also, is that the law penalizes the continuance of the confinement of the animals after they have already been confined the period of time permitted by the statute. The offense is not that the defendant itself confined the stock for a longer period than the authorized time, but that it continued to confine stock which had already been confined (whether by it or preceding carriers) as long as the law permits. Under this view if a carrier accepts from a preceding line a shipment on which the time limit has already expired it violates the law, and if its act is done knowingly and willfully it is liable for the penalty.[35] It is no defense that the preceding line has been fined for its violation since each carrier is separately guilty for having in its possession, without legal excuse, overconfined stock.[36] The other line of authorities proceeds upon the theory that one violation occurs when the time limit expires and the carrier in whose possession the stock were at that time is guilty, and that the time necessarily counted against the first carrier cannot be again counted against the connecting line. Under this view a minimum time of 28 or 36 hours as the case may be is required for the commission of each offense.[37] Under this rule a carrier which receives a car of stock which has already been over-confined is not liable unless a second time limit expires while the shipment is in its possession. If it can pass the car on to the next carrier before that occurs it escapes altogether.[38] These authorities hold that the imposition of a penalty satisfies the law for the period necessarily counted to make the first violation, and therefore such period cannot be counted again against the same or another carrier.

It is established, however, by the great weight of authority that where a connecting line or terminal company accepts a shipment already over-confined from the preceding carrier, for the purpose of carrying it to its pens, convenient to the junction, for unloading, feed and water, it does not thereby necessarily render itself liable to the penalty since such action is in aid of the humane purpose of the law. These decisions rest on the ground, not always specifically expressed, that the carrier's act was not done knowingly and willfully. But to avoid liability the carrier must transport the stock to the pens and unload them without unreasonable delay.[39] Where the time consumed substantially exceeds the usual run-

[31] Mobile & O. R. Co. v. U. S. (Ill.), 209 Fed. 605. See also Nor. & W. Ry. Co. v. Steele (Va.), 86 S. E. 124, where the release was by indorsement in shipper's handwriting on margin of bill of lading.

[32] Webster v. Union Pac. R. Co. (Col.), 200 Fed. 597.

[33] U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.), 166 Fed. 160; U. S. v. Atchison, T. & S. F. Ry. Co. (Kan.), 185 Fed. 105.

[34] Southern Pac. Co. v. U. S. (Cal.), 171 Fed. 360.

[35] U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; Grand Tr. Ry. Co. of Canada v. U. S. (N. Y.), 191 Fed. 803; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 156 Fed. 249.

[36] U. S. v Wabash R. Co. (Mo.), 182 Fed 802; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 221 Fed. 1000; U. S. v. Nor. Pac. Term. Co. (Ore.), 181 Fed. 879; N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

[37] U. S. v. Louisville & N. R. Co. (Tenn.), 18 Fed. 480; U. S. v. Sioux City Stock Yards (Ia.), 162 Fed. 556.

[38] U. S. v. Chicago, M. & St. P. Ry. Co. (Ia.), 234 Fed. 386 (holding defendant must itself have kept stock in confinement more than statutory period); U. S. v. Stockyard Term. Co. (Minn.), 172 Fed. 452 (does not decide whether second period would begin to run when defendant received the shipment, or from expiration of first

[39] U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971; Nor. Pac. Term. Co. v. U. S. (Ore.), 184 Fed. 602 (1300 feet to pens); U. S. v. Stockyards Term. Co. (Minn.), 178 Fed. 19 (11 miles to pens).

ning time to the pens the burden is on the carrier to show due diligence to unload promptly. Thus where the usual running time was 1 hour and 5 minutes it was held that the defendant did not sufficiently excuse itself for taking two hours and a half to unload the stock, by merely showing that the temperature was very cold and that the route lay through a busy part of the railroad yards.[40] The defendant must show *facts* from which the court can find that the time used was not unreasonable. The testimony of two conductors that the movement was reasonably prompt is not sufficient to satisfactorily explain why three hours and thirty-five minutes should be necessary to carry a car of stock seven miles and unload them; such movement is prima facie too slow.[41] In another case where the running time to the pens was about one hour, but the carrier failed to unload the stock for four hours and forty minutes, the court held that the burden was on the carrier to show that the delay was caused by storm, accident or other excepted cause.[42] It makes no difference that defendant is a link in the through route and carried the shipment in the direction of its destination.[43]

A few courts do not admit the soundness of the argument that a carrier may excuse itself for continuing the overconfinement on the ground that it does so solely for the purpose of unloading the stock as promptly as possible. They hold that the connecting line is under no obligation to accept a shipment on which the limit has expired, and take the view that the enforcement of the law will be better subserved if connecting lines refuse to receive shipments in such cases.[44] It is immaterial under this view that the defendant unloaded the animals as promptly as possible.

A carrier which delivers the shipment to the next line within the time limit is not guilty[45] unless such connecting line is a mere agency of the first line and not an independent carrier.[46]

The question of the connecting line's knowledge that the stock had been already over confined when received by it will be considered when we come to the discussion of the words "knowingly and willfully" in the statute.

Storm or Other Accidental Causes, etc.

The carrier does not violate the law by confining the stock beyond the statutory period where it is prevented from unloading them "by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." Defense under this exception must be pleaded and proved by the defendant. The Government need not allege in the complaint that the overconfinement was not caused by storm or accident.[47] It is held that an accident such as will excuse the carrier under this provision is "one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of everyone under the circumstances of the particular case; that is, such care and caution as would have been exercised by a man of ordinary prudence in the circumstances of the particular case; it does not include an accident caused by the negligence of the carrier, nor press of business, nor the side tracking of the train to allow passenger and fast freight trains to pass if such meetings were known or anticipated when the movement began."[48] The carrier must show that the breakdown or wreck relied on as an excuse did not result from a cause that due diligence and foresight would have anticipated and avoided.[49] It must be a cause "which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid."[50] Let us see the application made of these principles by the courts to the facts of particular cases.

[40] U. S. v. Delawa. e L. & W. R. Co. (N. Y.), 220 Fed. 944.

[41] N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

[42] U. S. v. Delaware, L. & W. R. Co. (N. Y.), 206 Fed. 513.

[43] St. Louis Merchants' Bridge & Trans. Co. v. U. S. (Ill.), 209 Fed. 60. (Eastbound shipments received in St. Louis and carried to pens in East St. Louis, Ill.)

[44] U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947; U. S. v. St. Joseph Stockyards Co. (Mo.),

[45] U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

[46] U. S. v. Union Pac. R. Co. (Utah), 213 Fed. 332. 181 Fed. 625.

[47] U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833.

[48] U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

[49] U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.), 166 Fed. 160.

[50] Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342.

In the case last cited a train of sheep was inspected before leaving a feeding station and nothing found wrong. It had enough time to reach the next feeding station within the time limit and before dark. Delay occurred, however, due to an unusual series of accidents; first on account of the breaking of a drawbar on another train on the road. A chain was substituted in place of the drawbar but this also broke. Further delays were caused by the breaking of a coupler and two drawbars on the sheep train, with the result that the train did not reach the unloading station until after dark, but within the time limit. The sheep were dragged out of two cars in the dark before the time limit expired. The men then became exhausted and allowed the rest of the sheep to stay in the cars all night. The carrier was held not guilty.

A car of stock reached a point sixteen miles from destination with four hours' margin. A drawbar pulled out necessitating the calling of a wrecking train. Later an air hose burst, these two accidents causing a delay of three hours and twenty minutes. The car was not unloaded until two hours and seventeen minutes after the time limit had expired.

In other words the carrier consumed nearly three hours, after deducting the accidental delays, in carrying the stock sixteen miles and unloading them. The court held that this was sufficient evidence to sustain a verdict of guilty since the jury may have found that the defendant did not use due diligence after the delays occurred. There was also room for the jury to find that a delay of about an hour and a half in calling for the wrecking train was negligent.[51]

In a recent case the court seems to draw a distinction between accidents, such as wrecks, which are practically (though not strictly) *vis major,* and congestion of traffic, holding the former to be covered by the exception, but not the latter.[52]

In another case the court left open the question whether a great and unusual press of business may not under some circumstances excuse the carrier, but held that a mere allegation in the answer that the over confinement was due to such cause, unexplained and of itself, does not state a good defense.[53]

[51] Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 268.

[52] U. S. v. Phila. & R. Ry. Co. (Pa.), 238 Fed. 428.

[53] U. S. v. Union Pac. R. Co. (Wyo.), 169 Fed. 65.

Under the old law, which excused the carrier where the unloading was prevented "by storm or other accidental cause" it was held that "other accidental cause" meant other unavoidable cause like a storm, and did not embrace accidents resulting from carrier's negligence.[54]

There are cases where weather conditions interfered with the unloading of the stock, but these cases will be discussed under the caption "knowingly and willfully," as they seem properly to belong under that head.[55]

Knowingly and Willfully.

While every confinement of stock in cars beyond the twenty-eight or thirty-six-hour period, as the case may be, is, in the absence of legal excuse, a violation of the law, it does not follow that the carrier is always liable for the penalty. The penalty is imposed only where the carrier knowingly and willfully fails to comply with the law. There is much confusion in the cases as to just what these words mean. A minority of the courts hold that if a carrier fails to comply with the law with full knowledge of the facts its action is willful.[56] These courts say that willfully only means without lawful excuse, or the intentional doing of the act forbidden.[57] The trouble with this view is that it practically deprives "willful" of any meaning in the law at all. Its effect is to hold a carrier guilty for receiving a shipment on which the time period has elapsed, for the purpose of unloading the animals, even where its refusal to receive them would greatly delay their release from the cars. We have seen that the majority of the decisions hold the carrier not liable in such a case provided it handles the shipment promptly.

The following language taken from the opinion in St. Louis & S. F. Ry. Co. v. U. S.,[58] expresses the prevailing view and has been much cited:

[54] Newport News & M. V. Co. v. U. S. (Ky.), 61 Fed. 488.

[55] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207; U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211.

[56] U. S. v. Phila. & R. Ry. Co. (Pa.), 238 Fed. 428.

[57] Newport News & M. V. Co. v. U. S. (Ky.), 61 Fed. 488; U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. Union Pac. R. Co. (Wyo.), 169 Fed. 65.

[58] (Mo.), 169 Fed. 69.

> "'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier received a car loaded with cattle, and, with knowledge of how long they had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded."

And the same court declares that "willfully" "means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."[59] It does not mean with evil intent or a bad and malignant heart on the part of the defendant, or with intent to injure the stock.[60]

Thus the carrier's failure to unload before expiration of the time limit may be done knowingly but not willfully, and, therefore, without incurring liability for the penalty, as where defendant, which had provided itself with sufficient suitable pens for the reasonable accommodation of its traffic, was compelled on account of unexpected delays to unload a shipment into pens at an intermediate station which were not properly equipped. The court did not decide whether unloading into improper pens was a violation of the law, but held, granting that it was, that the defendant's action was not willful under the circumstances.[61] But where the stock are carried in patent cars designed to dispense with unloading under the statute, it has been held that if the carrier knowingly and willfully confines the stock more than twenty-eight hours without their being fed it is guilty even though it appeared that there was a caretaker in charge, who had undertaken to feed the stock and had provisions in the car.[62] In such case it seems the carrier must see to it at its peril that the stock actually are properly fed and watered.

"Knowingly and willfully" is not synonymous with "negligently." In one case the court says:[63]

> "It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind it cannot be within the range of either knowledge or intention."

For example, if an employee had learned from the waybill how long the stock had been confined, but his attention being diverted, had forgotten to unload them within the time limit, his omission would not be willful.[64] So where the failure to unload in time was due to a clerical error of one of defendant's employees which others negligently failed to discover, it was not a knowing and willful failure to observe the law.[65] It has been held, however, that an answer alleging that the failure to unload the stock in due time was caused solely by the oversight, forgetfulness, and unintentional neglect of defendant's train dispatcher in not notifying the station agent of the movement of the car, did not state a good defense, since the knowledge of defendant's employees is imputable to it;[66] and where an employee in violation of the rules of the company which employees were required to read and strictly observe, negligently failed to note a waybill and direct unloading of the car, it was held that the carrier was liable.[67]

There is no uniformity among the court decisions as to the effect of a connecting carrier's ignorance of how long the stock had been confined when received by it. Some hold it must find out at its peril;[67] others that it is presumed to know how long they have been confined and to excuse itself on the ground of ignorance of the facts, it must show that it could not ascertain the facts by reasonable inquiry.[68] This is believed to be the sounder view; a third group seem to hold that if actual knowledge of the overconfinement is

[59] Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342; U. S. v. Stockyards Term. Co. (Minn.), 178 Fed. 19; St. Louis, M. B. & T. R. Co. v. U. S. (Ill.), 209 Fed. 60; N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833.

[60] U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.), 166 Fed. 160; Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 272.

[61] St. Louis & S. F. Ry. Co. v. U. S. (Mo.), 169 Fed. 69.

[62] Chicago, B. & Q. R. Co. v. U. S. (Neb.), 195 Fed. 241.

[63] U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705.

[64] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 213.

[65] Montana Cent. Ry. Co. v. U. S. (Mont.), 164 Fed. 400.

[66] U. S. v. Atlantic C. L. R. R. Co. (Va.), 173 Fed. 764.

[67] U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625; U. S. v. Sioux City Trans. Co. (Ia.), 234 Fed. 663.

lacking the defendant cannot be liable even though it failed to make any inquiry.[69] The decisions where this view is expressed are cases where terminal carriers accepted stock on which the limit had expired, or was about to expire, for the purpose of switching to the pens for unloading, and did so promptly, and it is believed that the cases can be distinguished on the ground that the carrier would not have been required to refuse to handle the stock under the circumstances, if it had known how long they had been overconfined.

The views of the courts as to what acts constitute a knowing and willful violation are illustrated by the following digest of cases:

A terminal company which received a shipment on which the limit had expired for switching to the stockyards on its line for unloading was held guilty, although it handled the car as promptly as possible and did not know that the limit had been exceeded. The court said it was obliged to find out how long the stock had been confined at its peril.[70]

Where defendant received a car of hogs from the preceding carrier two and a half hours before the time limit had expired, and two hours was a reasonable time within which it should have unloaded them, but failed to unload them until the time limit had been exceeded by more than an hour and a half, it was held guilty. It was no defense that the waybill was so indistinct that defendant's employees failed to discover the time of last loading noted thereon, nor that it was misled by the preceding carrier's having advised it by telephone that sixteen cars of sheep were coming on which the time limit was about to expire and had failed to mention the hogs which were moving in the same train.[71]

It has been held not to be a willful violation of the law for a connecting carrier to receive stock already confined beyond the limit, where the run to destination is only seven miles, and the stock would otherwise have to be carried fifteen or twenty miles for unloading.[72]

A shipment of livestock was delivered to defendant terminal company on which the time limit had expired. Defendant did not know how long the stock had been confined on account of the waybill not having been received until later. It switched the cars to its pens and unloaded them with reasonable despatch, but not with the usual speed due to an unusual number of cars being received at once. The court held that it was not guilty of knowingly and willfully violating the law, and pointed out that it would not have helped any for defendant to have inquired how long the stock had been confined since its pens were in any event the most convenient into which they could have been unloaded.[73]

Defendant, a switching line and stockyards company, received four cars of stock from a connection. Three of the loads had already been in the cars overtime and the limit was nearly up on the fourth. Defendant did not know how long the shipments had been confined and made no inquiry. It hauled the cars to its pens and unloaded them with due diligence and promptness, consuming two and a half hours in the operation. Held, this was not a knowing and willful violation of the law. The defendant had the right to assume that the preceding line had not violated the law.[74]

Defendant, a switching line, received several carloads of horses for switching to the yards for unloading after the limit had expired. It did not have access to the billing nor did it have actual knowledge how long the horses had been confined. It promptly unloaded all the cars except one, which, on account of an erroneous order having been given defendant, was first carried to the wrong unloading chute where the horses could not be unloaded without halters. This mistake necessitated the movement of the car to another pen and caused further delay. Held that the carrier was not guilty as to any of the cars, as its action under the circumstances did not constitute a knowing and willful failure to comply with the law.[75]

Where defendant's agent first refused to accept a shipment of stock from a connecting line, knowing that defendant could not unload it within the time limit, but five and a half

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[69] U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

[70] U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625.

[71] U. S. v. Sioux City Term. Co. (Ia.), 234 Fed. 663.

[72] N. Y. C. & H. R. R. Co. (N. Y.), 203 Fed. 953.

[73] U. S. v. Sioux City Stock Yds. (Ia.), 162 Fed. 556.

[74] St. Joseph Stockyards Co. v. U. S. 187 Fed. 104.

[75] U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724.

hours later, upon a second tender, did receive it, thinking the animals had been unloaded and fed in the meantime, it was held that defendant was not guilty if its agent was deceived or misled by the connecting line and on that account unavoidably confined the stock too long. In view of the narrow margin of time available in which the stock could have been unloaded and given five hours' rest it was held to be a case for the jury, the test being whether defendant's agent exercised reasonable care in the premises.[76]

Where a train load of sheep was delayed in reaching an unloading station until after dark on account of a series of unusual accidents to it and other trains, and the men dragged the sheep out of two cars in the dark before the thirty-six-hour limit expired, and then, becoming exhausted, left the rest in the cars until morning, it was held that the carrier was not liable for the penalty, the failure to unload not being knowing and willful.[77]

Defendant, initial carrier, delivered a shipment to the second carrier nine hours before the expiration of the time limit. The second carrier first received the car but an hour later it telephoned defendant it could not accept it, because it barely had time to get the stock to the third carrier without exceeding the limit and knew that the third carrier would refuse to receive them. Defendant notified the second carrier that it refused to receive the car back. Nevertheless the second carrier placed the car on the defendant's track before the limit had expired. Defendant had no actual knowledge at the time that the car had been returned to it, and as this was done at ten-thirty P.M., and defendant did not perform switching service at night, the car remained where placed all night and the time limit was exceeded. Next morning defendant switched the car to the pens and unloaded it. Held such facts did not constitute a case of knowingly and willfully failing to obey the law.[78]

The car arrived and was placed in a suitable place for unloading. The caretaker told the trainmen that he would notify the consignee, who would unload the stock. The carrier's agents, relying on the caretaker's assurances, took no steps to have the stock unloaded. The consignee failed to unload them until after the lawful period had expired and the carrier was prosecuted. The court held that it was for the jury to say whether the failure to unload under such circumstances was willful or due to accidental or unavoidable causes.[79]

The defendant placed a carload of hogs at a pen used solely by the consignee before the expiration of the time limit but after consignee's place of business had closed for the night, and notified consignee to unload. Consignee failed to do so, however, until after the limit had been exceeded. It appeared that the pens were uncovered and about a fourth of a mile from consignee's yards; that it was impracticable to drive the hogs from the pen to the yards in the night; that a blizzard was raging, so that good judgment dictated holding the hogs in the car rather than unloading them into the uncovered pen. The defendant was held not guilty. This was a case where defendant's act was knowingly but not willfully done. Nor was the carrier liable under the circumstances for having failed to provide covered pens.[80] So, under a similar state of facts except that consignee refused to unload on account of a storm, where it appeared that there were no suitable pens within available distance in which the stock could have been unloaded by the carrier, it was held that the carrier was not guilty.[81]

The complaint of the Government must allege that the defendant knowingly and willfully failed to comply with the requirements, but it need not allege that the failure was not caused by storm or other excepted cause.[82] The knowing and willful character of the failure must be shown by a preponderance of evidence.[83] This does not mean, however, that the Government must introduce evidence of a direct intent to do injury to the stock. Where complaint alleged that defendant knowingly and willfully confined the stock overtime and the answer denied this, and a stipulation of counsel admitted only that they were con-

[76] Oregon-Wash. R. & N. Co. v. U. S. (Ida.), 205 Fed. 342.

[77] Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342.

[78] U. S. v. Chicago, R. I. & P. R. Co. (Ill.), 211 Fed. 770.

[79] Oregon-Wash. R. & N. Co. v. U. S., 205 Fed. 337.

[80] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207.

[81] U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211

[82] U. S. v. Oregon Short Line (Ida.), 160 Fed. 526.

[83] U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

fined overtime, the court should neither instruct the jury to find for the defendant, nor direct a verdict against it, but should leave the issue of whether the act was knowingly and willfully done to the jury.[84]

Unit of Offense.

Until the matter was decided by the Supreme Court there was no little confusion among the lower courts as to what the unit of offense was under the law. It was early decided that there could not be a separate penalty imposed for each animal in respect to which the law was violated.[85] The view held by nearly all of the lower courts was that the shipment is the unit of offense, whether it be a shipment of a single animal, a carload, or several carloads.[86] The carriers sometimes contended that the train was the unit.[87]

The law is now settled by the decision of the Supreme Court in Baltimore & Ohio S. W. R. Co. v. U. S.[88] This case holds that neither the number of animals, nor their ownership, nor the number of shipments, has anything to do with the unit of offense. The test is the number of twenty-eight (or in case of shipper's release, thirty-six) hour periods which expire. For example, if the time limit of several cars handled on the same train will expire at the same time, upon the expiration of the limit only one offense is committed regardless of how many cars or shipments were affected, or of the ownership of the stock, or whether they were consigned to the same or different destinations. So where one car was shipped with thirty-six-hour release and eight hours later another car not released was loaded at another station and handled on the same train, only one offense was committed as to these two cars, since the time limits on them expired contemporaneously. The loading of a number of cars of stock belonging to different owners and destined to different points may be treated as a single act if not discontinuous or unduly prolonged and if the cars are carried in the same train the limit will be deemed to expire at the same time and place as to all, and the over confinement of all the stock will be but a single offense.[89] It has even been held that where a carload of cattle loaded at one station is handled on the same train with a car loaded a few minutes earlier at another station they may be treated as a unit. The court said:

> "There was practically but one offense, and the slight difference in time when the lawful period expired is insignificant, and therefore, giving the statute a reasonable construction, may be disregarded."[90]

Nature of Action.

The remedy for violation of the Act is an action by the Government for the penalty. Such action is civil in its nature and subject to all the incidents of a civil suit.[91] Hence the government need only prove its case by a preponderance of evidence,[92] and in case of an adverse decision may appeal.[93] Violation of the Act is not a crime.[94]

Amount of Penalty.

The minimum penalty is one hundred dollars and the maximum five hundred. Within these limits it is the court's province to fix the amount after verdict in accordance with

[84] Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 272.

[85] U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209 (arose under old law).

[86] U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. B. & O. S. W. R. Co. (O.), 159 Fed. 33 (train load theory rejected); N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833; U. S. v. Oregon, R. & N. Co. (Ore.), 163 Fed. 642; Sou. Pac. Co. v. U. S. (Cal.), 171 Fed. 360.

[87] See U. S. v. St. Louis & S. F. Ry. Co. (Mo.), 107 Fed. 870. (Ten cars of cattle shipped at same time by same consignor to same consignee moved in the same train. Court held that only one offense was committed, and seemed to take the view that the train was the unit. It does not appear whether all ten cars were covered by one bill of lading or by ten. If they all constituted but a single shipment, the case is not inconsistent with the shipment-unit theory.)

[88] 220 U. S. 94.

[89] U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947. See also B. & O. S. W. R. Co. case, supra.

[90] U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

[91] U. S. v. Atlantic C. L. R. Co. (Va.), 173 Fed. 764.

[92] U. S. v. Sou Pac. Co. (Cal.), 157 Fed. 459; U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 413; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15. Contra: U. S. v. Louisville & N. R. Co. (Ky.), 157 Fed. 979 (criminal in nature and Government must prove its case beyond reasonable doubt).

[93] Baltimore & Ohio S. W. R. Co. v. U. S., 220 U. S. 94. U. S. v. Baltimore & Ohio S. W. R. Co. (O.), 159 Fed. 33.

[94] Montana C. R. Co. v. U. S. (Mont.), 164 Fed. 400.

the heinousness of the offense.[95] In fixing the amount the court may properly consider the fact that the defendant had or had not instructed its employees to strictly obey the law,[96] or in an action against a connecting carrier for receiving a shipment confined overtime, that the first carrier had already been fined.[97]

JOHN PURYEAR.

Washington, D. C., October 29, 1917.

[95] U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 412; Missouri, K. & T. Ry. Co. (Kan.), 178 Fed. 15; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15; U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209.

[96] U. S. v. Delaware, L. & W. R. Co. (N. Y.), 220 Fed. 944.

[97] U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947.

THE TWENTY-EIGHT-HOUR ACT.

An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

(Act of June 29, 1906, ch. 3594, 34 Stat. L. 607.)

Sec. 1. (Transportation of animals—Time limit for continuous confinement—Extension of time—Unloading sheep.) That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbfore stated: Provided, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading subject to the aforesaid limitation of thirty-six hours.

Sec. 2. (Feeding animals at expense of owner—Lien on animals for cost—Owner may furnish food.) That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with Section 1 of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

Sec. 3. (Penalty for non-compliance—Exception.) That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, that when animals are carried in cars, boats or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

Sec. 4. (Prosecutions.) That the penalty created by the preceding sections shall be recovered by civil action in the name of the United States in the Circuit or District Court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Sec. 5. (Repeals.) That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

STATE COMMISSION DECLINES TO ORDER IMPROVEMENT "NOT DIRECTLY PROMOTIVE OF THE CONDUCT OF THE WAR."

As an instance of the spirit that is actuating some of the public service commissions of the country in the present crisis, the following excerpt from a recent unanimous decision of the Public Service Commission of New Hampshire, denying an application of the City of Manchester for authority to construct Woodland Avenue at grade over the tracks of the Boston & Maine Railroad, is of interest:

> "But above and controlling all other considerations is the fact that this country is now in a state of war, and among the most important instrumentalities for the successful conduct of the war is our railroad system. Every effort is being made to coordinate the railroads of the country into a single system, under a single head, in such wise as to make available for each, as needed, the resources of all. The strain laid upon the railroads by the demands made upon them for the transportation of men, materials, and supplies is stupendous. It has come upon them at a time when their facilities and equipment have already proved inadequate for the handling of existing business, and when all our producers of the needed equipment and facilities are straining every nerve to meet the requirements of the allied armies at the front. And with us the situation is aggravated by the fact that this unparallelled strain has fallen upon a bankrupt railroad.
>
> "We do not say that we will in no case order expenditure by our railroads not directly promotive of the conduct of the war. But it should be understood that so long as the public receives a service reasonably approximating that to which it was accustomed in times of peace and where the public safety is not manifestly and imminently endangered, we cannot be expected to order our railroads to expend large sums of money on improvements having no tendency, directly or indirectly, to enable them to better carry on what is now their supreme business—the business of the war—or to facilitate the distribution of food, fuel, and other necessaries of life.
>
> "Improvements desirable in times of peace, for the purposes of peace, will have to wait until peace comes."

INTERSTATE COMMERCE — OPERATOR OF PUMPING STATION.—An employee of an interstate railway company, engaged in operating a pumping station furnishing water indiscriminately and contemporaneously to locomotives engaged in interstate and intrastate commerce, is within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, Comp. St. 1916, Par. 8657-8665), as the test is whether the employee at the time of the accident was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. Roush v. Baltimore & Ohio R. Co., 243 Fed. 712.

RAILROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE. — One who before stepping upon a track at a grade crossing had an unobstructed view for 967 feet, and who, if he had then looked, must have seen the approaching train by which he was struck, was negligent. The court said:

> "If the deceased did not see the electric train in time to save himself, it was because he did not look. Where a person fails to see that which is plainly obvious, such person is clearly guilty of contributory negligence. The deceased must either have seen the electric train and have taken his chances of crossing in front of it, or he did not look."

Miller v. West Jersey & S. S. R. Co. (Pa.), 101 Atl. 766.

CARRIERS OF GOODS—NOTICE OF CLAIM—WAIVER.—A stipulation in a bill of lading for an interstate shipment that claim for damages must be filed within ten days after delivery of the shipment is reasonable and valid, and cannot be waived by the carrier (e. g., as by handling on the merits a claim filed after the time limit had expired). There is no presumption of law that claim was filed in accordance with the requirements of the bill of lading. Murray v. Atlantic C. L. R. Co. (S. C.), 93 S. E. 387.

INTERSTATE COMMERCE COMMISSION DECISIONS.

DEMURRAGE CHARGES—NOTICE OF ARRIVAL.

Complainant made various shipments of radiators and boilers from its several plants to its warehouse at East Forty-ninth Street, Bayonne, N. J., during July and August, 1912. During this period complainant's warehouse was connected with defendant's tracks by a private siding on which about nine cars could be placed for unloading. During the early part of July, 1912, cars consigned to complainant arrived at defendant's yards at Constable Hook in excess of the number unloaded. About July 15, 1912, defendant's eastbound track leading to complainant's siding was utilized as a storage track for complainant's cars, and the cars which had accumulated at Constable Hook were assembled and placed on that track. The demurrage accrued between the time of the alleged constructive placement of the cars on the storage track and the time they were unloaded and released. A witness for defendant testified that on July 20, 1912, he personally served upon an employee of complainant, who would ordinarily receive it, written notice of the constructive placement of about 65 cars held on the storage track on that date; that the employee refused to sign the original notice and the witness endorsed on the carbon the fact that he had served notice. However, according to defendant's records the last three car numbers shown on this notice did not arrive at Bayonne until after July 20 and therefore could not have been included in the notice.

HELD, That as to the cars placed on the storage track subsequently to July 20, 1912, no notice was given to complainant, as required by defendant's tariff, and the demurrage charges were therefore collected unlawfully. Reparation awarded. American Radiator Co. v. Lehigh Valley R. R. Co., 44 I. C. C. 361.

TRACKAGE AGREEMENT—RESTRICTIONS AS TO SERVICE.

The Kanawha & Michigan owns the right of way and rails from Gauley Bridge to Kanauga, distance 96 miles; it also owns the right of way and rails from Hobson to Corning, distance of 57 miles. Intervening between Kanauga and Hobson are 11 miles of track owned by the Hocking Valley Railway Company. Until June 24, 1886, these two disconnected portions of the Kanawha & Michigan's present through route were separately operated by the company then owning them. Under the terms of an agreement of June 24, 1886, between the predecessor of the Kanawha & Michigan and the predecessor of the Hocking Valley, the former acquired the right, for a period of 99 years and subject to certain restrictions, to use the rails of the latter lying between the two sections of track owned by the former; the lease, in fact, covers the 17 miles of Hocking Valley track extending from Gallipolis to Pomeroy, both being Hocking Valley points.

The object of the agreement was to enable the Kanawha & Michigan's predecessors "to make a continuous line of railway between the portion of its railroad in Ohio and the portion in West Virginia." The contract provided that the Kanawha & Michigan should have no right to accept traffic from or to any station upon the trackage line, except Athens, when originating at or destined to any point reached by the Hocking Valley or its connections. Athens was excepted because, being also on the rails of the Baltimore & Ohio Southwestern, it could be and was in fact then being served by the Kanawha & Michigan in connection with the latter line.

The substantial question for determination was how far one carrier, operating under a trackage agreement over the rails of another carrier and thus extending its facilities and enlarging its ability to serve patrons on its own line, may, by the terms of the agreement, lawfully limit its general obligations as a common carrier by an undertaking not to serve the shipping public at points along the leased line.

HELD, That the Kanawha & Michigan Railway Company, under the restraint of the contract, may lawfully decline to serve complainant. Hocking Domestic Coal Co. v. Kanawha & Michigan Ry. Co., 44 I. C. C. 392.

RE-ICING CHARGES ALLOWED ALTHOUGH NOTIFIED NOT TO RE-ICE.

Cabbage and other vegetables were shipped in refrigerator cars, initially iced by shipper from San Benito, Tex., consigned to Waco, Tex., with instructions on the bill of lading "Do not re-ice." Shipment was diverted en route to Denison, Texas, with the same instructions. Upon arrival at Denison it was reconsigned to St. Louis with instructions "Do not ice. Keep vents sealed open. Ice plugs out. Strictly ventilation."

Defendant's tariffs provide in connection with the refrigeration charge that even though carrier is advised that shipments "are not to be re-iced in transit, the full refrigeration rates published shall apply." The refrigeration charge is not attacked when refrigeration service is performed by defendants, but it was contended that charges should be based upon the actual cost of ice requested by shipper and furnished by the carriers, and that when the shipper furnishes the initial ice and requests that no ice be supplied, no refrigeration charge should be assessed. The record did not clearly establish whether or not the car involved was in fact re-iced in transit. Complainant assumed that the instructions not to re-ice were followed. Carriers claimed that it was immaterial whether the car was or was not re-iced in transit. Their witnesses did not know whether this shipment was re-iced or not, but stated that, regardless of shipper's instuctions to the contrary, all cars are examined and re-iced at all regular re-icing stations, if necessary.

HELD, That neither the rule assailed nor the charges applicable thereunder were shown to have been or to be unreasonable. Roy Campbell v. St. Louis, B. & M. Ry. Co., 44 I. C. C. 567.

CARRIERS OF GOODS—FLOODS—NEGLIGENCE IN FAILING TO ANTICIPATE RISE—EVIDENCE.—In an action for loss of a carload of paper it appeared that the car with others was in the defendant's freight yard at the time of an unprecedented flood which caused the Hudson River to overflow its banks and flood the railroad yard. The water coming in contact with lime in one of the cars produced a fire which spread to the other cars and destroyed plaintiff's shipment. By reason of the depth of the water on the tracks the defendant could not remove or otherwise protect the cars. The court held that the defendant was not negligent because it failed to act after the height of the water had rendered futile all efforts to save the property. The only negligence, if any, which could be imputed to the defendant was its failure to take precautions earlier when the river first began to rise and it was held that the amount of care required in this respect would depend on how far conditions gave reasonable grounds for expecting that the flood would rise so high as to endanger the goods.

It was held error to allow the plaintiff to introduce testimony that the day before the loss occurred the government weather forecaster had issued a weather map containing the prediction that the river would reach a height of 15 feet or over (such rise would not have reached the shipment), and the next day had sent a telegraphic warning to a newspaper of a greater rise, there being no evidence that such map and warning were brought to the attention of defendant's employees or that they had knowledge of the facts on which the weather man based his forecasts. International Paper Co. v. New York Cent. R. Co., 166 N. Y. Supp. 751.

CROSSING ACCIDENTS--VIOLATION OF THREE ORDINANCES NOT WILLFUL NEGLIGENCE.—In a crossing accident between a train and an automobile, the evidence showed that the defendant had violated three ordinances: one in failing to have a gate or flagman, another in allowing cars to stand within 150 feet of the crossing, and a third in running at a speed in excess of six miles per hour. It was contended that the simultaneous violation of these three ordinances indicated such a degree of recklessness or indifference as amounts to deliberate willfulness. It was held that this contention was not sound for the reason that if the breaking of one ordinance was not, in itself, indicative of negligence, the multiplication of the instances could not create a basis for the inference. Fluckey v. Southern Ry. Co., 242 Fed. 468.

CARRIERS—NOTICE OF CLAIM.—A stipulation in a contract for the interstate transportation of livestock that the shipper shall give notice in writing of any claim for damages before the stock are removed or intermingled with other stock, is valid, and is not complied with or waived by the giving of oral notice. The court intimates that the conditions of a bill of lading for an interstate shipment are applicable and controlling even in case of a shipment where no bill of lading was issued, since the railroad company has no authority to make any other contract than that contained in its uniform bill of lading, or livestock contract. Bryan v. Louisville & Nashville R. Co. (N. C.), 93 S. E. 750. See also Taft v. Atlantic Coast Line R. Co. (N. C.), 93 S. E. 752, holding that a notation of the damage made by the railroad agent on the freight bill is not sufficient.

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THE MEMORANDUM

Vol. III No. 5

LAW DEPARTMENT DECEMBER, 1917. SOUTHERN RAILWAY COMPANY

STATE QUARANTINE LAWS AND REGULATIONS—VALIDITY OF AS APPLIED TO INTERSTATE COMMERCE.*

In Hannibal, etc., R. Co. v. Husen, 95 U. S. 465, plaintiff had recovered damages resulting from the communication of Texas fever to his cattle by cattle conveyed into Missouri in violation of the Missouri statute which prohibited the bringing into the State of Texas of Mexican or Indian cattle during eight months of the year. This statute was held to be a burden upon interstate commerce and unconstitutional, in that it went beyond what was necessary for the protection of the State.

In Missouri, K.& T.Ry. Co. v. Haber, 169 U. S. 613, the action was brought to recover damages by reason of the communication to plaintiff's cattle of Texas fever by cattle brought into the State by the railroad company. The action was based upon a Kansas statute which provided that it should be a misdemeanor for any person between February 1 and December 1 of any year to bring into the State any cattle capable of communicating Texas fever; that any person violating the act should be liable to the person injured by the communication of said disease, and that proof that the cattle were brought into the State from south of the 37th parallel should be taken as prima facie evidence that the act had been knowingly violated (with an exception not necessary to state). Defendant claimed that the state statute was a burden upon interstate commerce and that Congress had so acted upon the subject matter as to nullify the state legislation.

The federal act (of May 29, 1884) provided for the establishment of a Bureau of Animal Industry, charged with the duty, under the instruction of the Commissioner of Agriculture, of investigating and reporting upon (among other things) the methods of suppressing and preventing the communication of animal disease. The Commissioner of Agriculture was further required to prepare rules for the suppression, etc., of such disease and certify same to the state governors and invite their cooperation and when the state and federal authorities should agree upon plans and methods in the premises, the Commissioner of Agriculture was authorized to expend money appropriated by the act in taking such quarantine measures as might be necessary. It was further provided that no railroad company should transport in interstate commerce any live stock affected with communicable disease and that no person should knowingly deliver such live stock to any railroad company.

The Supreme Court upheld the statute. It said (p. 623):

> "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Further (after referring to the scope of the federal act) (p. 623):

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* For other articles by the author dealing with the interpretation of the Commerce Clause in respect to the effect of federal legislation upon state laws, see **The Memorandum** for January, 1917, page 55, "Effect of Federal Act of March 4, 1915, Amending Boiler Inspection Law, Upon State Laws Prescribing or Regulating Locomotive Headlights," and **The Memorandum** for August, 1917, page 1, "Notes on Liability of Carrier for Failure to Furnish Prompt and Adequate Transportation Service as Affected by Recent Federal Legislation."

> "The act of Congress did not assume to give any corporation, company or person the *affirmative* right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. On the contrary it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or communicable diseases."

And the court went on to point out that the federal act did not deal with any question of civil liability for causing damage to the owners of domestic cattle by the introduction of cattle under circumstances which would violate the state statute and that neither the federal act nor any regulations established thereunder undertook to give any protection from such liability.

The cattle had been received by the initial carrier at a point outside the "infected district" as defined by the federal authorities but were by defendant carried through such district. The court said that the federal regulations may have been fully complied with but that even so no protection was afforded against the liability imposed by state law, which was in *aid* of the objects which Congress had in view when it passed the Animal Industry Act.

The court discussed the Husen case, supra, saying that the statute in that case was condemned because it went beyond the necessities of the case, while in the instant case the statute was passed by the State within the limits of what was needed for self protection, not excluding all Texas cattle but merely imposing a responsibility in damages upon one bringing in such cattle if it communicated disease. Further on the court carefully pointed out that it construed the state statute as not imposing liability if the defendant could show that he did not know that the cattle were liable to impart diseases and could not by the exercise of diligence have discovered it.

In Rasmussen v. Idaho, 181 U. S. 198, Rasmussen was convicted under a statute of Idaho and proclamation of the Governor. The statute required the Governor whenever he should believe that scab or any other infectious disease of sheep existed in any other State to designate such localities and prohibit the importation into Idaho of sheep from such places except under such restrictions as he might deem proper. The Governor accordingly issued a proclamation forbidding for 60 days the importation of sheep from certain designated territory in Utah and Nevada. The court upheld the conviction as against the contention that the authority therefor violated the Commerce Clause. It found the statute and proclamation to be reasonable and not subject to the objections which had led to the condemnation of the state statute in the Husen case, the Idaho statute authorizing the embargo only after investigation and the Governor having in his proclamation acted upon reasonable grounds and gone only so far as the defense of Idaho's sheep industry reasonably required. No question of federal legislation was discussed or (apparently) involved.

In Reid v. Colorado, 187 U. S. 137, Reid was convicted under a Colorado statute which provided that it should be unlawful for any person to bring into the State any cattle or horses from a State or country south of the 36th parallel unless such cattle or horses had been held north thereof for 90 days previous to their importation into the State or unless a certificate had first been secured from the state authorities. Reid had secured a certificate from a federal inspector but had ignored and violated the state requirements.

The case involved the same provisions of the federal law (act of May 29, 1884) as have been noted in the discussion of the Haber case (supra). The Supreme Court affirmed the state court's decision upholding the conviction. It declared that any rule which Congress made was paramount and that when "the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not," but the court declared that "Congress has not by any statute covered the whole subject of the transportation of live stock among the several States, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases."

In support of this view, the court took up the provisions of the federal act and construed them as not evidencing any intention to pre-

vent the State from taking measures to protect their live stock industry. In discussing these matters the court remarked (p. 148):

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'"

Referring to the provision of the federal law prohibiting any person from transporting any cattle in interstate commerce *known* to be affected with communicable disease, the court pointed out that this did not cover the entire subject of transporting diseased cattle in interstate commerce and left the State free to adopt and enforce further precautions of a reasonable nature such as were contained in the Colorado statute.

In Asbell v. Kansas, 209 U. S. 251, Asbell was convicted of the violation of a Kansas statute prohibiting any person from transporting into the State cattle from any point south of the south line of the State, except for immediate slaughter, without having first caused them to be inspected by the state or federal authorities. This case brings in the federal statutes of February 2, 1903 (32 Stat. 791, 10 Fed. Stat. Anno. p. 34), and of March 3, 1905 (33 Stat. 1204, 10 Fed. Stat. Anno. p. 35). The court declared (Mr. Justice Moody delivering the unanimous opinion of the court) that the only parts of the said acts that need be considered were the provisions of the act of 1903. The decision (affirming the state court) will be made clear by a quotation from the opinion (pp. 257-8):

> "In that law (of 1903) it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found them free from infectious, contagious or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported * * * into * * * any State or territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transporation of cattle from quarantined States, which is not this case. and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none."

The decision in this case was made in the face of the provisions of the federal law which are now to be mentioned (and which are still in force).

1. Act of 1903.—An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes. (10 Fed. Stat. Anno., p. 34.)

Section 1 confers upon the Secretary of Agriculture the powers which had been vested in the Secretary of the Treasury by sections 4 and 5 of the Act of May 29, 1884 ("to be exercised exclusively by him") in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot and mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases. This section authorizes and directs the Secretary from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place where he has reason to believe such diseases may exist into other States, etc., as he may deem necessary, and provides that

such regulations shall have the force of law. It further provides that when any federal inspector shall issue a certificate that any cattle or other live stock have been inspected and found free from disease, such animals may be transported in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Buerau of Animal Industry of the Agricultural Department for the purposes of such inspection.

Section 2 authorizes the Secretary to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of animal diseases from foreign countries, into the United States or from one State to another, and to seize and quarantine any hay, etc., or any hides, animal products, etc., coming from a foreign country into the United States or from one State to another whenever he deems advisable in order to guard against or suppress contagion.

2. Act of March 3, 1905.—An Act to Enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes. (10 Fed. Stat. Anno., p. 35).

Section 1 authorizes and directs the Secretary to establish quarantine district and to notify carriers of and publish information as to same.

Section 2 prohibits railroad companies, etc., from receiving or transporting, persons from delivering to them, and persons from driving or transporting in private conveyance from State to State from any quarantined area, any live stock except as provided in the subsequent sections.

Section 3 requires the Secretary to make rules which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock in interstate commerce from quarantined territory.

Section 4 provides that live stock may be moved from quarantined territory into another State under and in compliance with the regulations of the Secretary made under section 3 of the Act and prohibits any such movement of live stock in interstate commerce from quarantined areas "in manner or method or under conditions other than those prescribed by the Secretary."

Rule 13, referred to in the Asbell case, was as follows:

> "Rule 13. From the 1st day of February to the 31st day of October inclusive of each year, no cattle shall be transported or driven or allowed to drift from the area quarantined by the Secretary of Agriculture for splenetic fever into any State or Territory or the District of Columbia or portion thereof outside of the said quarantined area, except as hereinafter provided. During the months of January, November, and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenetic fever may be shipped without restrictions, other than those imposed by state or territorial officers at point of destination."

The Asbell case is direct authority for the proposition that the test is whether the state action actually conflicts with or obstructs the affirmative exercise by Congress of the powers of Congress on the subject and the action of the federal authorities authorized thereby. The State is allowed to supplement the federal laws and regulations and impose additional restrictions and requirements, in the absence of express federal prohibition. This view is supported by the case of Savage v. Jones, to be discussed.

The Asbell case decides that notwithstanding the fact that Congress has imposed upon the Secretary of Agriculture the duty of keeping informed of his stock conditions so far as disease is concerned, and not only authorizes but requires him to establish rules and adopt measures to prevent the communication of disease, yet that Congress has not by enacting these provisions taken possession of the entire subject matter so as to exclude the State; that, notwithstanding the Secretary, under the authority of the federal statutes, may have established certain quarantine districts and made rules regulating the transportation of animals, etc., therefrom (in interstate commerce), the State may decide that territory not covered by the federal quarantine shall be quarantined so far as the State is concerned. (I am, of course, assuming that any state law or regulation is not condemned by the doctrine of the Husen case as being arbitrary and palpably unnecessary.)

Under the doctrine of this Asbell case, the State may decide that the Secretary of Agriculture has not made rules or adopted measures which will protect it and may therefore make its own rules and adopt its own measures; or may reach the conclusion that the federal quarantine is not sufficiently extensive, and establish for itself additional territory which shall be considered quarantined.

What are the limits of the State's power (still assuming that the State's action is not to be condemned as arbitrary *per se*)?

If a federal inspector gives a certificate as referred to in section 1 of the Act of 1903, the State cannot prevent the introduction of the live stock or require any other inspection, because the federal act expressly says that such live stock may move without any further inspection. See the Asbell case, p. 258.

If the federal authorities under the Act of 1905 establish a quarantined area and make regulations under which live stock may move therefrom the State cannot, *as to live stock from such quarantined territory*, prohibit the importation or impose other conditions, because section 4 of the said act expressly says that such live stock may move from such quarantined territory under the regulations of the federal authorities and in no other manner.

Under the authorization of the Act of 1903, the Secretary may and is required to adopt such measures as he deems proper to prevent and suppress contagion. As we have seen, this does not prevent the State from regulating the subject matter, so long as the federal Secretary has not taken charge of the specific matter which the State is acting upon. Reid case; Asbell case; See also Missouri Pacific R. Co. v. Larabee Mills, 211 U. S. 612. But the question arises, Is the Secretary's power limited to affirmative regulations and measures operating on the subject matter, or can he affirmatively sanction movements under his regulations or officially declare that his rules or methods are intended to cover the subject matter and are exclusive? If the federal acts confer such power upon him and he exercises it, then the power of the State is abrogated and annulled. Can he, for example, say that the quarantine he has established is sufficient to prevent danger and that live stock may move from territory without such quarantined area without restriction of any sort? There is ground for the view that he cannot thus exclude state action in view of the decisions holding that Congress did not intend to prevent state action additional to the federal measures, save in the instances where the federal acts affirmatively authorize movement under federal regulations. The Asbell opinion, however, makes a point of the fact that the regulation of the Secretary "in terms recognizes instructions imposed by the State of destination."

The recent decision in Savage v. Jones, 225 U. S. 501, is interesting in connection with the subject of these notes. The question involved in this case was whether or not an Indiana Statute violated the Commerce Clause which prohibited the sale in Indiana of feeding stuff unless there should be first filed with the State Chemist a certificate showing among other things the ingredients which the article contained and unless a label showing the analysis of the article should be affixed to the package and an inspection tax paid. The court declared that the purpose of the state statute was to "prevent fraud and imposition in the sale of food for domestic animals" and that the object of the Food and Drugs Act (of June 30, 1906, 34 Stat. 768) was to prevent adulteration and misbranding. It pointed out that in the enumeration of the acts which would constitute a violation of the federal act Congress had not included the failure to disclose ingredients (save in specific instances, as where opium was present). The court defines the scope of the federal act as follows (pp. 531-2):

> "It is provided that the article 'for the purposes of this act' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading. (Section 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as

> articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture."

The court goes on to say that Congress "has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims." It shows that Congress has not in the statute expressly denied the power of the State to "permit imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis."

In answering (in the negative) the question whether any such denial is implied, the court remarks (p. 533):

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

The court proceeds to discuss the Haber, Reid, and Asbell cases in support of its decision. It also cites Northern Pacific Ry. Co. v. Washington, 222 U. S. 370 (Hours of Service case), but does not undertake to reconcile it. It is interesting to compare the foregoing quotation from the Savage case with the following from Southern Ry. Co. v. Indiana (February 23, 1913):

> "The test, however, is not whether the state regulation is in conflict with the details of the federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

See also the New York "Hours of Service" case, Erie R. Co. v. New York, 233 U. S. 671.

See also the Quarantine case of Chicago, Burlington & Quincy R. Co. v. Frye-Bruhn Co. (C. C. A. 8th Circuit), 184 Fed. 15, 20-22.

JOHN K. GRAVES.

HOURS OF SERVICE—COMPUTATION—WORK HOURS IN 24-HOUR PERIOD.—In an action under the Hours of Service Act, which provides that no telegraph operator shall be on duty longer than 9 hours in any 24-hour period at continuously operated offices, it was held that the following instance did not constitute a violation of this statute: The operator worked regularly from 7 a.m. to 3 p.m., but one occasion he was relieved from 1:30 p.m. to 3 p.m., at which time he returned to duty and remained on duty until 5:10 p.m. The court said in its opinion:

> "In using the expression 'any 24-hour period' Congress did not intend to describe what should constitute in any particular case a 24-hour period. The time when an employee should go to work and when he should be allowed to quit, provided the law was not violated, was left to the agreement between the employee and the employer. It would seem natural that an employer might on occasions, for the convenience of its employees, or to suit the exigencies of traffic, permit or require an operator to divide his usual hours of service."

United States v. Missouri Pac. Ry. Co., 244 Fed. 38.

HOURS OF SERVICE—EMERGENCIES.—Where by oversight or inadvertence a dispatcher failed to give orders to have car loads of live stock picked up by a certain train, this was not an emergency which justifies his keeping an operator on duty more than the prescribed hours in the Hours of Service Act, although his purpose was to expedite the movement of stock; nor is misinformation given a dispatcher as to time of arrival of a train on a connecting road an emergency justifying excess service; nor is the derailment of a train due to draw bar pulling out an emergency within the Act; nor is delay to train due to broken packing rings in the engine cylinder an emergency. The word emergency as used in the statute means more than ordinary mistakes and negligences which happen in the practical operation of railroads although it does not mean an extraordinary emergency as used in some statutes. United States v. Missouri Pac. Ry. Co., 244 Fed. 38.

DISMISSAL OF SUITS BROUGHT IN FOREIGN JURISDICTIONS.

In THE MEMORANDUM for July, 1917, the opinion in the case of Weaver v. Alabama Great Southern R. Co. (Ala.), 76 So. 364, was printed, sustaining an injunction against a resident of the State of Alabama going into Georgia and bringing action there for an injury received in Alabama. Reprinting this opinion, *The Bulletin* of the Association of Railway Claim Agents, in its issue for September, 1917, presented a line of authorities supporting the proposition that the foreign court in which suit is brought should dismiss the action as an imposition upon its jurisdiction. This discussion was reproduced in THE MEMORANDUM for October, 1917.

George J. Mersereau, assistant attorney at Kansas City, Mo., for the Atchison, Topeka & Santa Fe, has suggested another method of accomplishing the same result, as follows:

> A foreign corporation cannot be sued in a State other than its domicile on contracts made or torts committed in some State other than the State where the action is brought.

Developing this point, Mr. Mersereau points out that it has always been recognized that the jurisdiction of a state court over a foreign corporation and the amenability of a foreign corporation to service of process rested upon the consent of such corporation, either express or implied, to submit itself to such jurisdiction. Mr. Mersereau's discussion, as published by *The Bulletin,* is as follows:

Where a corporation, in compliance with a statute, designated a process agent, the consent was express.

Where it did not designate a process agent but was doing business in the State, the courts held that it took the burden along with the benefits of the State legislation, and impliedly consented to be sued where such legislation authorized suit.

But consent, either express or implied, lay at the foundation of the jurisdiction.

In B. & O. R. R. Co. v. Harris, 12 Wall., 65, the Court, at page 81, said of the Company:

> "It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly."

But the generality of such language early began to be limited. For instance, in the case of Lafayette Ins. Co. v. French, 18 Howard 404, the court, speaking of the right of the State to compel foreign corporations transacting business in the State to submit to the jurisdiction of the state courts, held that the State has power to require the corporations "to answer there for the breach of their contract of insurance, *there made and to be performed.*"

Further on in the opinion the court says:

> "We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence, *for the purposes of making contracts there and being sued on them,* through notice to its contracting agents."

In St. Clair v. Cox, 106 U. S. 350, the Court, after reviewing the extensive business carried on by the corporation in States other than that of its domicile, says:

> "Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."

See also:

Mutual Life Ins. Co. v. Spratley, 172 U. S. 602; Old Wayne Life Ins. Assn. v. McDonough, 204 U. S. 8; Simon v. Southern Ry., 236 U. S. 115; Fry v. D. & R. G., 226 Fed. 893; Gold Issue Mine & Mill Co. v. Fire Ins. Co., 267 Mo. 524, 184 S. W. 999; 37 Sup. Ct. Rep. (U. S.) 344.

INTERSTATE COMMERCE COMMISSION DECISIONS.

Refrigeration Charges—Tariff Interpretation.

Complaint attacks refrigeration charges on carload of peaches shipped from Sale Creek, Tenn., to Cincinnati, O., reconsigned to Dayton, O. The tariff provided a refrigeration charge of 10 cents per 6-basket crate, Sale Creek to Dayton, in connection with the following rule:

> The minimum refrigeration charge on peaches in six-basket crates will be for 535 crates, unless carrier, for its own convenience, furnishes cars of 38 feet, 8 inches in length, in which case the minimum refrigeration charge will be for 525 crates; further, if carrier, for its own convenience, furnishes cars of 36 feet, 8 inches or less, in length, the minimum refrigeration charge will be for 476 crates.

The refrigerator car used was 40 feet in length, outside measurement, and 32 feet, 5⅞ inches, inside measurement. It contained 504 crates, weighing 21,168 pounds. Complainants contend the rule above quoted should be construed to refer to inside dimensions, the refrigeration minimum being 476 crates, therefore charges should be based on actual number of crates. Defendant insists the rule refers to outside dimensions and that refrigeration charges should be based on minimum of 535 crates, for car 40 feet in length. HELD, under the circumstances outlined in the report, That the tariff rule dimensions refer to the outside measurement. Geo. E. Markley & Co. v. Cincinnati, N. O. & T. P. Ry. Co., et al., I. C. C. 559.

Reconsignment At Joint Rate—Refusal of Initial Carrier To Retake From Connection.

Three carloads of lumber were consigned from Arkansas and Texas points to Chicago, Ill., being stopped in transit at Thebes, Ill., and subsequently reshipped to Cairo, Ill. At Thebes they were delivered to the Chicago & Eastern Illinois by the Cotton Belt, following complainant's routing instructions. The Chicago & Eastern Illinois held the cars at Thebes and requested advice from complainant as to disposition. Complainant gave instructions to reconsign to Cairo at joint rates of 16 cents applicable over the routes of movement to Thebes and the Cotton Belt beyond. The Chicago & Eastern Illinois did not participate in the joint rates of 16 cents and attempted to return the shipments to the Cotton Belt but the latter refused them. The Cotton Belt had no local rate from Thebes to Cairo. Complainant then instructed the Chicago & Eastern Illinois to forward to Cairo over its line and the Mobile. During a controversy over the refusal of the Cotton Belt to receive at Thebes the shipment originating on its line at Lufkin demurrage charges of $29 accrued. Complainant cited a rule of the Cotton Belt providing that where reconsignment requests are made and the property involved has been switching to connecting carrier, all charges of such connecting carrier for their service must be assessed against the shipment in addition to the reconsigning charge. This rule, however, applied only on carload freight while in the possession of the Cotton Belt. HELD, That the Cotton Belt was justified in refusing to transport these shipments beyond Thebes at the joint rate of 16 cents, and that the charges assessed, including demurrage, were legally applicable. Hilgard Lbr. Co. v. C. & E. I. R. R. Co., et al., 45 I. C. C. 513.

Demurrage Accruing Under Federal Embargo Lawfully Assessed.

A shipment of hay moved from Starder, Wis., consigned to Chicago, Ill. On arrival at destination consignee refused to accept shipment because of bad condition. The delivering carrier made request the same day for disposition instructions and complainant tendered a proposed bill of lading consigning the hay to St. Louis. This was refused because of an embargo declared by the Federal Government against Wisconsin hay on account of reported foot-and-mouth disease infection. The hay was disposed of in Chicago about ten days later. HELD, That Federal embargoes being declared in the interest of the general public, carriers incur no liability to the shipper whose goods are embargoed. Union Hay Co. v. C. St. P. M. & O. Ry. Co., et al., 45 I. C. C. 597.

Refund of Prepaid Freight Charges—Jurisdiction of Commission.

Complainant shipped carload of billiard table parts, etc., from Muskegon, Mich., to Mexico City, Mex. When the shipment arrived at New Orleans, La., it was turned over to

the Wolvin Line, in accordance with routing instructions, and that line was paid $367.63 of the total freight charges by the rail carriers to the port to cover the movement thence to destination. After being loaded on the steamer and before it left the dock the shipment appears to have been damaged by fire and water to the extent of becoming practically worthless, and consequently was not forwarded to destination. The property was covered by insurance in the amount of $4,016.56, representing the cost of production, as shown in the consignor's invoice to its Mexican branch house, which sum has been paid to complainant by the insurance adjusters. The steamship company, however, declined complainant's claim for refund of the prepaid freight charges, or any portion thereof, on the ground that its bill of lading provided that "freight prepaid shall not be returned, goods or vessel lost or not lost." Upon similar refusal on the part of the rail carriers the complainant filed this complaint.

HELD, That the Commission is without jurisdiction to determine either the legal liability of the Wolvin Line for the physical damage to the property in question or the propriety of the bill of lading provision relied upon by that carrier in declining to refund the freight charges, the whole, in the view of the Commission, constituting a single cause of action or claim, the one being an integral part of the other.

While it is well settled that the Commission may award damages for reparation of injuries resulting from violations of the act to regulate commerce, it is equally well settled that the Commission has no authority to award damages due to other causes. It therefore seems clear that if complainant has a valid cause of action it is one for loss and damage cognizable in the courts and not by the Commission. Brunswick-Balke-Collender Co. v. Toledo, S. & M. Ry. Co., 44 I. C. C. 598.

MASTER AND SERVANT—EVIDENCE—MATTER OF CONJECTURE.—In an action for the death of a railroad servant, killed by an explosion of a power plant, where there was no direct proof as to how the gas escaped or accumlated, or that doors or windows were closed, nor any evidence of what deceased did after entering the room, the happening of the accident was no proof of the employer's negligence, and the plaintiff had the burden of proving it. The court held that a non-suit should have been granted. Williams et al. v. Western & A. R. Co. (Ga.), 93 S. E. 554.

MASTER AND SERVANT—SAFE PLACE TO WORK—NEGLIGENCE.—In an action for injuries to plaintiff, while engaged with others in carrying a steel frog to place it in position on the ties of defendant's road under construction, that there were loose rocks scattered about upon the ground, and plaintiff stumbled over one of the rocks, is of itself no evidence of negligence, and it was held that the court erred in refusing a peremptory instruction for defendant, as the accident was one of the ordinary hazards incident to the character of the work. Louisville & N. R. Co. v. Reese (Ky.), 198 S. W. 14.

CARRIERS—NOTICE OF CLAIM.—In an action for damages for loss of an interstate shipment the burden is on the plaintiff to show that he made claim in writing in accordance with the requirements of the bill of lading. Smith v. Seaboard Air Line Ry. Co. (N. C.), 93 S. E. 469.

SAFETY APPLIANCE ACT—NEAREST AVAILABLE POINT FOR REPAIRS.—In an action under the Safety Appliance Act which permits a defective car to be hauled "to the nearest available point" for repairs, availability depends upon other things than mere distance. In this case it was held not any violation of the Act to haul a defective car in a westbound train to a point 37 miles west of the point where the defect was discovered, rather than to a point 17 miles east. The court said on page 796:

> "Availability obviously depends, under the statute, on other considerations beside that of mere distance. Whether Fitchburg was, under all the circumstances, the 'nearest available' point for the repair of this car, was a matter of business judgment. Upon such a question, involving as it does many elements, the decision of those in charge of the business, if made in good faith, is entitled to serious consideration. It is not shown to have been wrong in this instance."

United States v. Boston & Maine R. Co., 243 Fed. 795.

CARRIERS—FREIGHT CHARGES—LIABILITY OF CONSIGNEE.—A shipper delivered a shipment of scrap iron to a terminal switching railroad company consigned to defendant, and received the bill of lading of the terminal railroad company stamped "Prepaid". The freight charges were not in fact prepaid. The custom was for the line haul carrier to collect the freight charges from the shipper, but in this case when it received the shipment the shipper had become insolvent so that collection could not be made from it. The line haul carrier therefore forwarded the goods as a "collect" shipment. The consignee was on a monthly credit basis and shipment was delivered without collecting any charges. At the end of the month plaintiff, the delivering carrier, sent the consignee a bill for the freight, which consignee refused to pay on the ground that the bill of lading showed the shipment as prepaid and settlement had been made with the shipper on that basis. HELD, Consignee was liable for the freight charges. Duncan v. United Steel Co. (O.), 244 Fed. 258.

INJURY TO PASSENGER — SWAYING OR LURCHING OF CARS.—A railway company does not insure the safety of its passengers and some risks of travel must be assumed by the passengers. A case where passenger is thrown in the car by the ordinary swaying and lurching due to the speed of the train around curves and over heavy grades which are necessary by reason of the nature of the country through which the track is built does not present facts sufficient to show negligence and there can be no recovery therefor. In its opinion the court says:

> "In many parts of the country, of which the locality in question is an example, railroads can be built only in the narrow space between a range of mountains or hills on one side and a winding stream on the other. Under these conditions a road must have frequent curves, some of which will be 'sharp', to say nothing of heavy grades which often characterize such a right of way. And it is manifest that high speed trains cannot be run over a roadbed of this kind, however well constructed, without more or less tilting and swaying of the cars, and even something like jolting, as curves are rounded or brakes applied. So far as these motions, by whatever name called, are the necessary results or incidents of proper operation, they cannot charge the carrier with liability to a passenger thereby injured, because they are risks which the passenger assumes."

Chesapeake & O. Ry. Co. v Needham, 244 Fed. 146.

ARREST OF PASSENGER—DUTY OF RAILWAY COMPANY TO PROTECT.—The plaintiffs, residents of Pennsylvania, were arrested while en route through the State of New York by police officers of that State and removed from the train. The arrest was made without a warrant and upon telegraphic orders from the police department of another city in the State upon the belief that they were implicated in crimes committed in Indiana. Investigation developed that the plaintiffs were not guilty and they were promptly discharged. Suits were then instituted against the railway company to recover damages the annoyance and indignities suffered, claim being that the defendant had an affirmative duty to protect them as passengers from a wrongful arrest and had failed to perform it. Plaintiffs claimed that they had been denied rights secured by Article 4, section 2, subdivision 2, of the Federal Constitution, by reason of which they could not be legally arrested in New York for a crime committed in another State, except upon compliance with the provision of Section 5278 of the Revised Statutes of the United States; that such being the law, the defendant's employees were bound to know it and protect them, its passengers, from arrest unless all steps had been taken which would have justified their extradition upon application of another State. Affirming the dismissal of the suits by the state court, the Supreme Court of the United States held that the alleged federal right which the plaintiffs asserted was not immunity from arrest without a warrant, but immunity from arrest until requisition was granted; that this is a matter within the jurisdiction of the particular State and that no federal right of the plaintiffs was denied. Lucinda Burton and Cora B. Heeren v. New York Central & Hudson River R. R. Co., 71-72, October Term, 1917, Supreme Court of the United States, decided December 10, 1917.

JUDICIAL CODE SECTION 237—CERTIORARI OR WRIT OF ERROR TO SUPREME COURT OF THE UNITED STATES.—Under Section 237 of the Judicial Code as amended September 6, 1916, a final judgment or decree of a state court of last resort may be reviewed in the Supreme Court of the United States upon writ of error where is drawn in question (1) the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or (2) the validity of a statute of or an authority exercised under, any State, on ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; but judgment or decrees of such court can be reviewed in the Supreme Court of the United States only upon a writ of certiorari where there is drawn in question (1) validity of a treaty or statute of, or an authority exercised under, the United States, and decision is in favor of their validity; or (2) the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or (3) where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is either in favor or against the title, right, or privilege or immunity claimed.

A suit was brought in a state court in New York by a resident of that State against a Pennsylvania corporation to recover damages for personal injury sustained in Pennsylvania. The defendant was doing business in New York, and conformably to the laws of that State had designated an agent therein upon whom process might be served. The process in the case was served upon this agent and the defendant moved to set it aside as void, contending that its consent to be sued in New York by service upon this agent was only implied with respect to cause of action arising in New York and that under the facts in this case to compel the defendant to respond to the process was an invasion of its rights under the United States Constitution, particularly Section 1 of the Fourteenth Amendment, the due process of law clause.

The Supreme Court of the United States decided that the judgment that the process was valid could not be reviewed upon writ of error, but only upon writ of certiorari on the grounds that no question was raised as to the validity of any treaty, statute, or authority exercised under the United States, nor the validity of any statute or authority of any State because repugnant to the Constitution, treaties, or laws of the United States. The court held that if a review was desired of the judgment it should have been sought under that clause of the certiorari provision which reads, "Or where any title, right, privilege, or immunity is claimed under the Constitution," etc. It was pointed out in the decision that the difference between the two modes of securing a review as contemplated by the statute was in the fact that a writ of error was granted as of right, while a writ of certiorari is granted in the exercise of sound discretion. The decision is interesting in that it is the first construction by the Supreme Court of the United States of the amendment of September 6, 1916, to Section 237 of the Judicial Code. Philadelphia & Reading Coal & Iron Company v. Gilbert, 454 October Term, 1917, Supreme Court of the United States, decided November 26, 1916.

JUDICIAL CODE—ACT OF SEPTEMBER 6, 1916 — CERTIORARI — FINAL JUDGMENT. — Under the Act of September 6, 1916, amending Section 237 of the Judicial Code, by which the right of review by writ of error was changed to petition for certiorari, finality of judgment of the lower court continues to be an essential for the purposes of the remedy.

In an action in a state court by father of deceased engaged in interstate commerce at the time of his death, to recover one half of the amount paid by the railroad company to the administrator of the deceased, the Supreme Court of the State set aside the action of the trial court in rejecting the plaintiff's claim and directed a new trial to accomplish that result.

Petition for a writ of certiorari was denied by the Supreme Court of the United States on the ground that although the action of the State Supreme Court was in a sense final in that it determined the ultimate right of the father of the plaintiff to recover and the general principles by which that right was to be measured, yet it had not the finality necessary to sustain the writ as it was not a final judgment determined by the face of the record and the formal character of the judgment rendered contemplated by the Act of 1916.

Bruce, Admr., v. Tobin, No. 625, October Term, 1917, Supreme Court of the United States, decided October 22, 1917.

OFFICE NOTES AND COMPILATIONS OF AUTHORITIES.

EDITORIAL NOTE.—In the course of the work of the staff of the General Counsel, a large number of legal notes and compilations of authorities have been prepared from time to time. It is proposed to publish some of this material in this column of THE MEMORANDUM for the purpose of preserving it in convenient form and for the benefit of counsel. It will be printed as of the date of preparation.

CONSTITUTIONAL PROVISION AGAINST IMPAIRMENT OF THE OBLIGATION OF CONTRACTS vs. THE POLICE POWER OF THE STATES.

CAN A STATE INVALIDATE A CONTRACT BY A RAILROAD COMPANY TO GIVE A LIFE PASS IN EXCHANGE FOR A GRANT OF A RIGHT OF WAY, VALID WHEN MADE, BY A LAW THEREAFTER ENACTED?

I hand you a digest of the best cases throwing light on this question. For a statement of the general principle see American & English Encyclopedia, Vol. 15, p. 1042, and Vol. 22, p. 938.

In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the question of the right of a State to impair a charter provision giving a railroad company the right to charge more for a shorter than for a longer haul, by the enactment of a long haul clause, is left open, the court having found that there was no impairment in the case before it, inasmuch as the charter provision was subject to the right of the legislature to alter or amend.

In Delmas v. Merchants, etc., Ins. Co., 81 U. S. 661, 20 L. Ed. 757, it was held that a contract the consideration for which was Confederate money, being valid when made, was unconstitutionally impaired by a provision subsequently inserted in the state constiution making such contracts void.

In Bridge Proprietors v. Hoboken Co., 1 Wall. 116, it was held that where a state statute authorized commissioners to contract for the building of a bridge and provided that no other bridge should be built over the stream for 99 years, the statute constituted a contract which could not be impaired by subsequent legislation.

So where a bridge company was given a charter authorizing it to build the bridge and collect tolls, and providing that it should be unlawful for anyone else to erect another bridge or establish a ferry within two miles of the bridge, it was held that this was a contract protected by the federal constitution against impairment.

Binghampton Bridge case, 3 Wall. 51.

In New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650, it was held that a charter giving a lighting company an exclusive privilege of supplying gas in a city through pipes and mains in the streets, for a given time, constituted a contract within the protection of the federal constitution against any impairment by subsequent legislation of the State or change in the constitution. *The court held that the exclusiveness of the grant had no relation to the public health or safety,* since these considerations depend upon the nature of the business and not upon whether it is conducted by one person or many. The court admits that the constitutional provision does not restrict the power of the State to protect the public health, morals, or safety, and the State could enforce regulations not inconsistent with the essential rights of the Gas Company to protect the public from injury arising out of the improper use of the streets for mains, or the failure of the company to supply gas of the required quality and amount. See also New O. W. Co. v. Rivers, 115 U. S. 674.

Where a street railway had a contract right by virtue of ordinances of the city to charge five cents fares, the company could not be required by statute to sell six tickets for 25 cents, the contract being protected against impairment by the federal constitution.

Detroit v. Detroit Citizens St. Ry. Co., 184 U. S. 368.

Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417.

Dillon, Municipal Corporations (5th ed.), section 1326.

It has been held that where a contract existed between a city and a railroad with respect to the paving, etc., in the streets occupied by the railroad, which contract was intended to fully cover the subject, the railroad could not be subjected to local assessments for the paving, etc., of the streets. It is said:

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for the legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect."

Chicago v. Sheldon, 9 Wall. 50.

The constitution of Georgia provided that no court should enforce a contract the consideration for which was the sale or hiring of a slave. In an action on a note for the price of a slave sold before the adoption of the constitutional provision it appeared that the contract was valid when made and the court held that it was beyond the power of the State to impair the contract by taking away all remedy thereon.

White v. Hart, 80 U. S. (13 Wall.) 646, 20 L. Ed. 685.

A contract for interest on interest, valid when made, is unconstitutionally impaired by a state law making such contracts unlawful.

Koshkonong v. Burton, 104 U. S. 668.

So is a charter fixing a rate of tax to be paid by the corporation in lieu of all other taxes, by a state statute imposing other taxes.

Farrington v. Tennessee, 95 U. S. 679.

There was dissent among the judges in this case.

A mortgage contract conferring power of sale upon breach of condition, valid when made, is unlawfully impaired by a subsequent statute given the debtor twelve months to redeem.

Bronson v. Kinzie, 1 How. 311.

And a grant of exclusive privileges to a water company is impaired by a statute abolishing monopolies.

St. Tammany v. New O. Water Works Co., 120 U. S. 64.

Where a town under legislative authority made a contract with a water company for water at certain maximum rates, such contract could not be impaired by the State or town.

Vicksburg v. Vicksburg Water Works Co., 206 U. S. 497.

Beer Co. v. Mass., 97 U. S. 25, holds that where the beer company was authorized by its charter to manufacture and sell liquor, it could not do so in defiance of a subsequent state prohibition law forbidding the sale of liquor. The court refers to the difficulties of stating the exact limits of the police power of the States, but says that there seems to be no doubt that it extends to the protection of the lives, health, and property of the citizens and to the preservation of good order and the public morals; and the legislature cannot divest itself of the power to provide for these objects, which are governed by the maxim *salus populi suprema lex.*

So also in Fertilizer Co. v. Hyde Park, 97 U. S. 659, it was held that a State could, under the police power, prevent a fertilizer company from carrying offal through the streets to its factory, though it was authorized by its charter to place the factory where it was. This was done under the power to protect the public health.

And it has been held that a charter authorizing a company to conduct a lottery for 25 years does not protect the company from a subsequent law forbidding lotteries, since a lottery is a species of gambling, wrong in its influence and tending to produce a population of speculators; and no legislature can bargain away the public health or the public morals.

Stone v. Mississippi, 101 U. S. 814.

See also Butchers' Union, etc., v. Crescent City, etc., Co., 111 U. S. 746, holding that a State by contract bargain away its right to regulate slaughter houses in cities, in which case it is said:

"While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the *public health* and the *public morals.*"

In Mannigault v. Springs, 199 U. S. 473, an act of the South Carolina legislature for the drainage of certain swamp lands authorized the erection of a dam, contrary to the terms of a contract between the plaintiff and other riparian owners that the stream should not be obstructed. In disposing of this contention the court said:

"The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the general assembly of 1903, permitting the defendants

by name to construct and maintain the dam in question.

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

"While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with."

Under the police power a State may require one of several railroad companies to repair a viaduct over a public highway though there was a contract between the railroads and the city in respect to the maintenance of the viaduct, which was thereby impaired. The right of the State to legislate for the protection of the public safety, health, and morals cannot be restricted by such contracts or withdrawn from the operation of the police power of the State.

C. B. & Q. R. Co. v Nebraska, 170 U. S. 57.

A State cannot bargain away the police power so as to disable itself from taking proper measures for the protecting of the public health. Hence a gas company which has been given an exclusive right to lay mains in the street and supply the city with gas may be required to change the location of some of its mains in order to permit the city to construct a proper drainage system, and it will have no claim for the cost of relocating the mains.

New Orleans Gas Light Co. v. Drainage Com., 197 U. S. 452, 49 L. Ed. 831.

In the Railroad Com. Cases, (Stone v. Farmers Loan & Trust Co.), 116 U. S. 307, 29 L. Ed. 636, it was held that a mere general power to regulate rates and manage its affairs given a railroad company in its charter is not sufficient to constitute a contract so as to preclude the State from fixing reasonable rates. It is said by the court:

> "This power of regulation is a power of government, continuing in its nature; and if it can be a bargained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power."

None of these cases are entirely in point on the question of the right of a State to impair the obligation of a contract, valid when made, between a railroad company and a land owner for a pass for life over a portion of the road in consideration of a grant of a right of way. Most of the cases deal with the impairment of contracts between the State itself, or an agency thereof, and a citizen, and the decision turns on the power of the State to bargain away the police power. In other words, these are cases where the constitutional provision against impairing the obligation of contracts did not apply because the so-called contracts being an attempt to sell the inalienable police power of the State were never binding contracts. This reasoning is inapplicable police power of the State were never binding contracts. This reasoning is inapplicable where the contract is between individuals, for in such case no question of the State's bargaining away its police power can arise. I believe, however, that the same policy which leads the courts to hold that the State cannot by contract estop itself from exercising its police power, would also induce them to hold that such power of the State cannot be restricted by a contract between individuals. This conclusion is suggested in the case of C. B. & Q. R. R. Co. v. Nebraska, supra, in which the court said that such contracts are made with the understanding that they are subject to future valid exercise of the police

power of the State. In this view of the situation it would seem that the right of private persons by their contracts to limit the future exercise of the police power of the State is coextensive with the power of the State to contract in that regard. Hence if a State could validly contract with a railroad that it should have power to grant a life pass in payment for a right of way, so as to estop the the State from thereafter passing a law invalidating such pass, then the railroad company could make such a contract and it would be protected under the federal constitution, provided it was valid under the law of the State when it was made.

Under the Supreme Court's decisions a State may by contract estop itself from reducing rates below a stipulated sum. It would seem that it could also by contract give a railroad company power to exchange transportation for a grant of a right of way. Hence my conclusion is that the contract for the pass having been valid when made is protected by the constitutional provision against impairment.

This conclusion would seem to be sound on general considerations, since the constitution of the United States is the supreme law of the land, superior to the police power of the States. Hence, on principle, any contract, valid when made, would be protected by a constitutional provision forbiding the States to pass any law impairing the obligation of contract. To claim the benefit of this provision it should be necessary on principle only to establish the original validity of the contract.

February, 1916.

Railroads—Injuries To Person On Tracks—Duty of Company.—Where plaintiff, employee of a coal company engaged in weighing cars at scales on different railroads' right of way, in going from the scales to the office without invitation in preference to taking a path along the track walked upon the track, he was a mere "licensee," to whom defendant was not liable for any defect in the track, and he cannot complain of failure to signal when he saw the train in time to get out of the way, but for the fact that his foot was caught between a tie and a switch rod, as the injury was not due to the failure to signal, but to the fact that plaintiff got his foot caught. The court held that defendant was entitled to a directed verdict. Nashville, C. & St. L. Ry. v. Lovejoy (Tenn.), 198 S. W. 61.

Carriers of Goods—Concealed Loss—Burden of Proof.—In an action for loss of a portion of the contents of a box shipped from New York to Niagara Falls the evidence showed that the box had been opened and the goods extracted between the time it left consignor's warehouse in New York and its arrival at destination. The robbery may have occurred while the box was in possession of the drayman in New York or while it was in possession of the carrier. There was no evidence tending to locate where the loss occurred. Held, the burden was on plaintiff to show the loss occurred after delivery of the box to the carrier. This presumption is not affected by the bill of lading reading: "Received * * * in apparent good order, except as noted (contents and condition of contents of package unknown)." Wallens v. New York C. & H. R. R. Co., 166 N. Y. Supp. 1033.

Carriers—Diverting In Transit—Authority of Shipper and of Consignee.—Plaintiff shipped a carload of chickens from Wichita, Kan., consigned to its agent at San Francisco, Cal. The defendant knew that plaintiff was the owner of the shipment. While the shipment was en route, plaintiff ordered it diverted to a party at Oakland, Cal. The defendant complied with this order. Before the car reached Oakland the original consignee, having learned that the party at Oakland to whom he had sold the chickens would refuse them, requested defendant's division freight agent to let the shipment come on to him as originally billed. The division freight agent undertook to do this but the operating department of defendant refused to change the destination and the car was carried to the consignee at Oakland. As a result delay was caused which damaged the plaintiffs. The defendant did not know that the San Francisco consignee was the shipper's agent and he did not furnish any evidence of his authority. HELD, that the carrier properly obeyed the shipper's instruction, since it knew that the owner, but was under no obligation to obey the consignee's instruction for the reason that as the situation appeared to the carrier the consignee had no right to give such instructions. The carrier was held not liable for the delay. Wichita Poultry Co. v. Sou. Pac. Ry. Co.

Carriage of Passengers—Liability For Assault and Robbery—Proximate Cause. A railroad is not liable to a passenger assaulted and robbed on its train, the cars being without light and badly overcrowded, there being no causal connection between the road's supposed negligent act in overcrowing and failing to light its cars and the injury charged to have resulted therefrom. Chancey v. Norfolk & Western Ry. Co. (N.C.), 93 S. E. 834.

Injury To Pullman Porter —Employment Contract Exempting Railroad Companies.—Where a Pullman porter in his contract of employment agrees to exempt any railroad company, over whose lines he may be carried, from liability on account of any injury to him, such contract is valid in Florida, where there is no statute or decision establishing that such a contract is void as against public policy. Sec. 3148 of the general statutes of Florida providing that a railroad company will be liable for damage done to persons by its trains or employees is not declaratory of a public policy of the State. The contract, being made in Florida, is determined by the law of that State, the suit being brought therein, although plaintiff was injured in another State. Eubanks v Southern Ry. Co., 244 Fed. 891.

Death By Wrongful Act—Proximate Cause — Contributing Cause. — Where a person has received an injury and many months later dies of a germ disease in no wise connected with such injury, a cause of action does not arise against the wrongdoer on the theory that by reason of injuries the victim's constitution became weakened and an easy prey for disease. The court in so holding said:

> "Looking at the whole evidence, and taking that view and drawing those inferences most favorable to plaintiff's case, we are unable to see that it falls within the statutes of this State regarding death by wrongful act. Conceding, as must be conceded under such a view of the evidence, that the plaintiff received an injury to his bladder or kidneys, that he was immediately confined to his bed from which he never arose, that his health immediately began to fail, that his condition became more and more enfeebled, and that he was thereby rendered an easier victim of the pneumonia germ, we do not see how it can be said that the defendan'ts wrongful act was the natural and proximate cause of the intestate's death."

Mayor and City Council of Nashville v. Reese (Tenn.), 197 S. W. 492.

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THE MEMORANDUM

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LAW DEPARTMENT JANUARY, 1918. SOUTHERN RAILWAY COMPANY

POWER OF STATE TO EXCLUDE OR IMPOSE CONDITION PRECEDENT UPON CORPORATION ENGAGED IN INTERSTATE COMMERCE—REVIEW OF SOME OF SUPREME COURT DECISIONS.

In Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, a statute of Kansas provided that foreign corporations should be required as a condition of doing an intrastate business in the State, to obtain a license and pay a charter fee based on its capital stock. The Western Union Company declined to pay this fee and was enjoined by the State Court from doing an intrastate business in the State.

The Supreme Court held that a corporation engaged in interstate commerce could not be thus excluded from a State, the condition of its doing the intrastate business being an unconstitutional burden upon interstate commerce.

Speaking by Justice Harlan the Court says:

> "The State concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the court to oust the company from the State, so far as local business is concerned, unless it shall, by paying such fee, contribute—that is the proper word—a given per cent of all its capital for the support of the schools of the State. The State knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying a 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public—a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union."

In the above case the Court reviews previous cases at length. Some of the cases relied upon are as follows:

McCall v. California, 136 U. S. 104, where a carrier operating a line of railroad between Chicago and New York, and maintaining an agency in San Francisco for soliciting passengers to travel over its road, was sought to be taxed by the State of California on such soliciting business, it was said:

> "It was one of the '*means*' by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In the leading case of Crutcher v. Kentucky, 141 U. S. 47, the statute drawn in question made it unlawful for an agent of a foreign express company to open an office and do business in the State until the charter and a sworn statement was filed with the State Auditor, showing that the company had an actual capital of not less than $150,000 in cash or safe investments, and showing the assets and liabilities. Certain fees were prescribed for filing these papers which fees were on account of the company's business in Kentucky, no discrimination being made between

interstate and domestic business done there. The Court expresses itself as follows:

> "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Again, it was said in Norfolk & Western Ry. Co. v. Pennsylvania, 136 U. S. 114, by Justice Lamar:

> "It is well settled by numerous decisions of this court, that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, *or impose any burdens upon such commerce* within its limits."

Neither can a State put a tax upon the gross receipts of one of its own corporations, derived from both domestic and interstate business, because such a tax is a regulation of interstate commerce and inconsistent with the power of Congress under the Commerce Clause of the Constitution.

Philadelphia, etc., v. Pennsylvania, 122 U. S. 326.

> "A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

Minnesota v. Barber, 136 U. S. 313.

In International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678, it was held that a state statute requiring a foreign correspondence school, soliciting students in the State, and giving them instructions by correspondence from the home office in the foreign State, to file a certificate with the Secretary of State showing its financial condition and to pay a small fee therefor, as a condition precedent to doing business within the State, was an unconstitutional burden upon interstate commerce.

The exclusiveness of federal law over state law, where Congress has legislated on a matter within its constitutional power is well shown by the Court in Chicago R. I. & P. Ry. Co. v. Hardwick, etc., 226 U. S. 425, 57 L. Ed. 284, where it is said:

> "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State has a right to exert its authority in the absence of legislation by Congress, it must follow, as a consequence of the action of Congress to which we have referred, that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the State may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it has no inherent, but only permissive, power."

A city ordinance requiring the licensing of wagons and drivers of express companies, and the giving of a bond for each wagon licensed,

as a condition precedent to engaging in the express business, is unconstitutional as applied to wagons and drivers engaged in delivering interstate shipments (though they also handle local shipments in the same vehicle), because an interference with interstate commerce, inconsistent with congressional regulation of the subject.

Barrett v. New York, 232 U. S. 14.

Oklahoma v. Kansas Nat. Gas Co., 221 U. S. 229. This case holds that a State statute limiting the construction of pipe lines for the transportation of natural gas to domestic corporations, whose charters must forbid them to carry gas out of the State, and providing that foreign corporations formed for the purpose of transporting natural gas shall not be allowed to conduct such business in the State, or to lay its pipes across public highways of the State, is repugnant to the Commerce Clause of the Constituion. In the course of the opinion the Court says:

> "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of the State, and that it cannot be regulated or restrained by a State, or that a state cannot exclude from its limits a corporation engaged in such commerce. To attain these unauthorized ends is the purpose of the Oklahoma statute. The State through the statute seeks in every way to accomplish these ends, and all the powers that a State is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented. Corporate persons are more subject to control than natural persons. The business is therefore confined to the former, and foreign corporations are excluded from the State. Lest they might enter by the superior power of the Constitution of the United States, the use of the highways is forbidden to them and the right of eminent domain is withheld from them, and the prohibitive strength which these provisions are supposed to carry is exhibited in the fact that the boundary of the State is a highway. If it cannot be passed without the consent of the State, commerce to and from the State is impossible." (P. 260.)
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> "The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." (P. 262.)
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> "We have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. That was the purpose, as it is the result, of the Interstate Commerce Clause of the Constitution of the United States. If there is to be a turning backwards it must be done by the authority of another instrumentality than a court." (P. 255.)

An ordinance of the city of Sault Ste. Marie requiring a Canadian corporation licensed by the Dominion Government to operate a ferry across the St. Mary's River from the city of Sault Ste. Marie to the opposite shore to obtain a license from the mayor, for which an annual fee of $50 was charged, was held invalid as an attempt by the State to regulate foreign commerce in violation of the Commerce Clause of the Constitution. The Court says:

> "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local

license for the mere privilege of carrying on interestate or foreign commerce."

City of Sault Ste. Marie v. International Transit Co., 234 U. S. 333, 58 L. Ed. 1337.

CONTRIBUTOR.

December, 1917.

Railroads — Injury To Trespasser — Sufficiency of Evidence.—In an action against a railroad for wanton injury to a trespasser on its right of way, evidence that the servant of the railroad operating its train had knowledge that a piece of timber was protruding from a car, one of the dangerous elements of the situation, was held insufficient to justify submission to the jury of the question whether the injury was the result of reckless indifference to consequences or intentional wrongful omission of some duty. Shepard v. Louisville & Nashville R. Co. (Ala.), 76 So. 850.

Carriers—Injury To Person At Station By Fellow-Passenger—Non-Suit.—Where one intending to board a train at a station stood on the side of the track opposite the station platform between the main track and standing freight cars, and was knocked down by one attempting to board the train, and fatally injured, there should have been a non-suit or a directed verdict for defendant carrier. Kalleberg v. Raritan R. Co. (N. J.), 102 Atl. 350.

Demurrage—Tariff Applicable. — Coal was shipped to a lake port at a time when the railroad tariff provided for free storage in the cars at the port for a certain period. After the shipments moved, however, a new tariff was published and became effective reducing this period. The court held that the railroad company was entitled to collect demurrage under the latter tariff on all cars held after it became effective. The court distinguishes a demurrage or storage tariff from a rate tariff on the ground that storage is not strictly a transportation service but rather an accommodation which the carrier is not legally bound to furnish. Chesapeake & Ohio C. & C. Co. v. Toledo & O. C. Ry. Co., (C. C. A. 4th Ct.), 245 Fed. 917.

Railroads—Derailment of Train At Crossing—"Res Ipsa Loquitur."—Where derailment of a train was caused by a pile of sand on tracks at a crossing, the railroad is not liable for injury to fireman caused thereby where the evidence failed to show how the sand and gravel came to be there, or that it had been there any length of time before the accident. The doctrine of *res ipsa loquitur* does not apply and in such case there is no inference of negligence on the part of the railroad. McGillivray v. Great Northern R. Co. (Minn.), 164 N. W. 922.

Statute Requiring Stop At State Line Held Void.—Chapter 283 of Laws of 1915, Kansas, required the Public Utilities Commission to compel interstate passenger trains to stop at or near the state line for a reasonable time. The Kansas Supreme Court holds that this requirement was not in exercise of the police power, undertook to regulate interstate commerce in a matter already regulated by proper federal authority, placed an unwarranted burden on interstate commerce, deprived interstate railroads of their property in lawfully established interstate passenger fares, and was therefore unconstitutional and void. State v. Dickinson, Receiver Chicago, R. I. & P. R. Co. (Kan.), 168 Pac. 838.

Railroads—Crossing Accidents—Imputed Negligence.—A person riding in a buggy as a guest or by favor must exercise all care which ordinary caution requires when his companion drives upon a railroad crossing, and, in this case, the plaintiff was held contributorily negligent in allowing his companion to drive on a railroad crossing without protest or investigation, when an electric bell was ringing and standing box cars obscured an approaching train. Burton v. Pryor et al. (Mo.), 198 S. W. 1117.

Master and Servant—Heavy Loads—Assumption of Risk.—A railroad company is not bound to warn or instruct its section men as to their duty in moving and piling ties 8 or 9 inches square, 12 feet long, and weighing approximately 150 pounds, and the servant assumes the risk of injury from strains in lifting same; it being assumed that he should be the best judge of his own lifting capacity. Rook v. Davenport, etc., R. Co. (Ia.), 165 N. W. 419.

STATE'S POWER TO REQUIRE INTERSTATE PASSENGER TRAINS TO COMPLY WITH ADVERTISED SCHEDULES DENIED BY UNITED STATES SUPREME COURT.

The opinion of the United States Supreme Court in Missouri, K. & T. R. Co. v. Texas, No. 113, October Term, 1917, handed down January 14, 1918, denying the power of a State to require interstate passenger trains to comply with advertised schedules, is herewith printed in full:

SUPREME COURT OF THE UNITED STATES.

No. 113.—October Term, 1917.

The Missouri, Kansas & Texas Railway Company of Texas, et al., Plaintiffs in Error, v. The State of Texas.

In Error to the Court of Civil Appeals, Third Supreme Judicial District, of the State of Texas.

[January 14, 1918.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the State of Texas to recover penalties for violation of an order of the State Railroad Commission. This order required passenger trains in Texas to start from their point of origin and from stations on the line in accordance with advertised schedule, allowing them not exceeding thirty minutes at origin or points of junction with other lines to make connection with trains on such other lines, and not exceeding ten minutes more if at the end of the thirty minutes the connecting trains were in sight. There were some other qualifications not necessary to be stated. The defendant's passenger trains concerned were numbers 9 and 209, and were parts of a train, also numbered 9, of the Missouri, Kansas, & Texas Railway, a different corporation, taken charge of by the defendant at Denison, Texas, about five miles south of the Texas and Oklahoma state line, under a contract with the Missouri, Kansas & Texas. In pursuance of this contract they were forwarded via Dallas and Fort Worth to Hillsboro, thence as one train to Granger and there again divided, the two parts going respectively to Galveston and San Antonio. There were similar arrangements for trains to the north. The cars received by the defendant came from St. Louis and Kansas City, Missouri, uniting at Parsons, Kansas, and thence proceeding south to Denison. The Court of Civil Appeals at first held that the movement must be regarded as a continuous one from Kansas City and St. Louis, and that the order did not apply to the train; but on a rehearing decided that as the defendant took control at Denison with new crews and engines, and as the defendant could not go beyond the State line, the movement so far as the defendant was concerned was wholly within the State. Breaches of the order having been proved, it affirmed a judgment imposing a fine. A writ of error was refused by the Supreme Court of the State.

The Supreme Court gave up the manifestly untenable ground taken by the Court of Civil Appeals and recognized that the defendant's trains were instruments of commerce among the States, but it construed the order as applying to them none the less and held it valid as so applied. The only question with which we have to deal is whether the State Commission could intermeddle in this way, especially when there was sufficient accommodation for local traffic independent of the through trains. The defendant in error attempts to open this last matter, because the opinion of the Court of Civil Appeals in which the fact was stated was reversed by it for a different reason, and that of the Court of first instance was the other way. But we regard the decision of the intermediate and the Supreme Court as proceeding upon the assumption that we have stated and that we see no reason to disturb. Again, the question is not what the State Commission might require of a road deriving its powers from the State, with regard to local business, *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 283, but whether the order if applied to this case would not unlawfully interfere with commerce among the States.

On its face the order as applied was an interference with such commerce. It undertook to fix the time allowed for stops in the course of interstate transit. It was a serious interference, for it made the defendant liable for an interstate train not starting on schedule time, when the train did not come into the defendant's hands, from another company in another State, until too late. This, as we understand the facts, was the train to which the advertised schedule applied, and if so, the mere statement of the result is enough to show that the burden imposed not only was serious but was unwarranted as well as unjust. The suggestion that compliance with the order

could have been secured by having an extra train ready to run if the regular one was not on time hardly is practical, and is not an adequate answer, even in form. For the defendant advertised, or at least had the right to advertise, the interstate train, and, if it did so, would not free itself from liability for a delay on the part of that train by offering another. We think it plain that this order was applied in a way that was beyond the power of the Commission and Courts of the State. Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310. Chicago, Burlington & Quincy R. R. Co. v. Railroad Commission of Wisconsin, 237 U. S. 220, 226. South Covington & Cincinnati Street Ry. Co. v. Covington, 235 U. S. 537, 548.

Judgment reversed.

Passenger Standing On Platform—Negligence.—In an action for damages against an interurban railway brought by a passenger for being thrown from the platform to the paved roadway and injured, the court said:

> "It is the duty of a passenger to go inside of the car, and if he is injured while standing upon the platform the burden is upon him to show that there was no unoccupied room inside of the car, or, if there was such room, that it was impracticable for him to reach it because of the crowded condition of the passageway leading thereto. Failing to meet that burden, he is chargeable with contributory negligence and cannot recover."

Panek v. Scranton R. Co. (Pa.), 102 Atl. 274.

Live Stock Contract—Construction.—A contract for the transportation of cattle from Ulysses, Pa., to Philadelphia contained a "thirty-six-hour limitation," and bore a memorandum, "Put off at Lancaster, Pa., for feed and water." The railroad company carried the car over its own line and a connecting line, the Philadelphia & Reading, to Philadelphia without going through Lancaster, and without apparent delay or any injury from delay. The shipper ordered the cattle sent to Lancaster, where they were sold. The shipper subsequently sued the railroad company for breach of contract, claiming that the shipper was entitled to feed charges in Philadelphia, freight charges from Philadelphia to Lancaster, a loss because of a decline in the market price of cattle at Lancaster, yard charges at Lancaster, and feed charges pending the sale. The Pennsylvania Superior Court held that a compulsory nonsuit was properly entered. The carrier was not responsible for a loss caused by the transfer of the stock from the point of destination to another market where loss occurred. Stauffer v. New York Central R. Co., 66 Pa. Sup. Ct. 208.

Explosion of Torpedo—Evidence of Negligence Insufficient.—The explosion of a torpedo placed on the track of a railroad by unknown persons resulted in the death of a freight conductor. The torpedoes were shown by the evidence to be the same kind as those kept by the railway company in its locked store-room a short distance from the scene of the explosion. It was further shown that the store-room in which the torpedoes were kept was not always securely fastened, and that the key was accessible to the company's employees. Plaintiff rested her case in an action for the death of her intestate upon these facts, it being her theory that it was sufficient for her to show that the torpedoes were thus negligently kept where some thief might have stolen them and placed them on the track, where by explosion they killed the employee. The Kansas Supreme Court held that a demurrer to the evidence was properly sustained. Norman v. Atchison, T. & S. F. R. Co. (Kan.), 168 Pac. 830.

Interstate Commerce—Pumper.—A railway employee engaged in running an engine which pumped water into a tank for the use of locomotive engines engaged in interstate commerce is engaged in such commerce, or his work is so closely connected therewith as to be a part of it, and he is entitled to sue under the federal Employers' Liability Act. Collins v. Erie R. Co., 245 Fed. 811.

Hours of Service—Release of Hour and a Half.—Where employees are relieved from duty for a period of an hour and a half, but were required to hold themselves in readiness for service and to be within reach in case they were needed prior to the expiration of the hour and a half, such a release is not sufficient to break the continuity of the service and the time they are off is included in computing their 16 hours of service. United States v. Southern Pacific R. Co., 245 Fed. 722.

SUPREME COURT OPINION IN "STOCK DIVIDEND" CASE, TOWNE v. EISNER.

The opinion of the United States Supreme Court in the so-called "stock dividend" case, involving the question of whether or not stock dividends declared by a corporation are taxable as income under the Income Tax Act of 1913, is of considerable interest to attorneys. It is printed below in full, accompanied by a statement issued by the Commissioner of Internal Revenue with respect to the decision:

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1917.

Henry R. Towne, Plaintiff in Error, v. Mark Eisner, Collector of United States Internal Revenue for the Third District of the State of New York.

In Error to the District Court of the United States for the Southern District of New York.

[January 7, 1918.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. 242 Fed. Rep. 702. The facts alleged are that the corporation voted on December 17, 1913, to transfer $1,500,000 surplus, being profits earned before January 1, 1913, to its capital account, and to issue fifteen thousand shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914, and that the plaintiff received as his due proportion four thousand one hundred and seventy-four and a half shares. The defendant compelled the plaintiff to pay an income tax upon this stock as equivalent to $417,450 income in cash. The District Court held that the stock was income within the meaning of the Income Tax of October 3, 1913, c. 16, Section II; A, subdivisions 1 and 2; and B. 38 Stat. 114, 166, 167. It also held that the Act so construed was constitutional, whereas the declaration set up that so far as the Act purported to confer power to make this levy it was unconstitutional and void.

The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the Act. But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Lamar* v. *United States*, 240 U. S. 60, 65. Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the Court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this Court should think that the construction would make the Act unconstitutional. While it keeps the money it opens the question whether the Act construed as it has construed it can be maintained. The motion to dismiss is overruled. *Billings* v. *United States*, 232 U. S. 261, 276. *B. Altman & Co.* v. *United States*, 224 U. S. 583, 596, 597.

The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. *Billings* v. *United States, ubi supra.* Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this Court upon the latter question is equally true for the former. "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together repre-

senting the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons* v. *Mahon*, 136 U. S. 549, 559, 560. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County* v. *United States*, 169 U. S. 255, 261. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for $1,000 par were split up into ten certificates each, for $100 we presume that no one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

Judgment reversed.

INTERNAL REVENUE COMMISSIONER'S STATEMENT.

On January 10 the Commissioner of Internal Revenue, referring to the opinion in the above case, made the following official statement:

> "Misapprehension exists as to the effect of the decision of the Supreme Court in the case of Towne v. Eisner, handed down January 7, 1918. In this opinion it was held that under the act of October 3, 1913, a stock dividend declared by a corporation January 2, 1914, was not properly regarded as income.
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> "It does not necessarily follow, however, that no stock dividends are to be held taxable under the provisions of the acts of September 8, 1916, and October 3, 1917.
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> "The act of October 3, 1913, which was the only act before the court in the case, contained no provision expressly providing for treating stock dividends as income, and the decision of the court was to the effect that the act was not to be construed as taxing such dividends. The court did not decide that such dividends cannot be income within the meaning of the sixteenth amendment, but expressly recognized that the word 'income' may have a different meaning in the statute from the meaning in the Constitution.
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> "The act of September 8, 1916, contains an express provision taxing stock dividends declared and paid out of earnings accrued since March 1, 1913. In the absence of a decision as to the legal effect of these express provisions contained in the later acts, the bureau of internal revenue naturally will continue to be governed by the express provisions of the later acts in reference to stock dividends."

CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—In an action for injuries by a train to the driver of a taxicab at a crossing where, from the physical facts established, the plaintiff, had he looked and listened, must have observed the approach of a train, the California Court of Appeal held that the fact that he testified that he looked for the train and did not see it until he was on the track did not absolve him of contributory negligence. The mere fact that telegraph poles obscured his vision at one point did not absolve the plaintiff of contributory negligence when for 30 feet immediately before he drove upon the track the view was unobstructed, since one crossing a railroad track must look for a train where such looking would be effective. Jones v. Southern Pac. Co. (Cal.), 168 Pac. 586.

HOURS OF SERVICE—RAINFALLS CAUSING WASHOUTS.—Where rainfalls affect the track and bridges of a railway company so that trains were delayed and it could not be accurately estimated how long a certain trip would take, this does not relieve the company from the penalty of the Hours of Service Act for excessive service of its train crew.

The cause of the delay was known when the train left the terminal, and it was only the duration of the delay that was unknown. The delay was not caused by a "casualty" or an "unavoidable accident" or by an "act of God." United States v. Southern Pacific Company, 245 Fed. 722.

INTERSTATE COMMERCE COMMISSION DECISIONS.

Unlawful "Embargo."

Complainant tendered carload of lumber to the Iron Mountain consigned from Moark, Ark., to Cypress, Ill., on the Chicago & Eastern Illinois for the use of that road. The Iron Mountain had previously issued a circular which it termed an "embargo" against consigning lumber originating on its line to Cypress, except material for the use of the Chicago & Eastern Illinois. Not knowing the lumber was for the use of the Chicago & Eastern Illinois, the agent at Moark refused to issue a bill of lading showing Cypress as the destination. To avoid delay and demurrage complainant accepted bill of lading showing Dupo, Ill., as the destination point. At Dupo the shipment was reconsigned to the Chicago & Eastern Illinois at Danville. HELD, That this was not a legal embargo and that it was the duty of the Iron Mountain to accept and forward shipment as originally requested by shipper, and that as a result of its refusal to do so complainant was damaged to the extent of the difference between the charges collected and those that would have accrued had the shipment been forwarded over the route specified by complainant. Powell-Myers Lbr. Co. v. St. Louis, I. M. & S. Ry. Co., et al., 45 I. C. C. 594.

Re-Icing Charges.

A carload of peaches was shipped from Mountainburg, Ark., to St. Louis, reconsigned to Detroit, Mich. Refrigeration and re-icing charges are assailed as illegal to the extent they include a charge for re-icing shipment at East St. Louis, Ill. While shipment was at St. Louis it was reconsigned to Detroit and delivered to the Terminal Railroad Association of St. Louis and switched to the Wabash which road carried it to destination. The complainants contend that the tariff provisions provide a charge for re-icing, in addition to the through refrigeration charge, only when shipments are re-iced at points at which stopped or held for reconsignment upon shippers' or consignees' orders; that this shipment was held at St. Louis for reconsignment; that the ice was placed in the car at East St. Louis, a point at which the shipment was not held on complainant's orders; that after leaving St. Louis the shipment was in transit to Detroit; and therefore that the re-icing at East St. Louis was properly included in the through refrigeration charge, and the additional charge for such re-icing was made without legal authority. HELD, That complainant's contention is not well founded, and that the tariff rule authorized the assessment of an additional charge for re-icing at East St. Louis. Harmon & Evans v. St. Louis & S. F. R. R. Co., et al., 45 I. C. C. 581.

Track Storage Charges Found Legally Assessed.

Seventeen carloads of potatoes were forwarded from various Minnesota points to complainants at Kansas City under order-notify bills of lading. Shipments were refused at destination and defendant collected demurrage and track storage charges in accordance with its applicable tariff provisions. Complainant attacks the reasonableness of these provisions, alleging that they did not provide that shippers should be notified that cars billed to shipper's order would be placed on the tracks where track storage charges applied; that without orders from complainant to the contrary, which were not given, the shipments should not have been moved into Kansas City proper, but should have been held in defendant's classification yard at which yard storage charges would not have accrued; that, by reason of a special request placed by complainant on the bills of lading, complainant was entitled to prompt notice by defendant of the nonacceptance of the shipments, in order that detention charges might be avoided. HELD, That the track storage charges were not shown to have been unreasonable or otherwise violative of the Act. J. C. Famechon Co. v. Chicago, B. & Q. R. R. Co., et al., 45 I. C. C. 598.

Interchange Arrangements Found Preferential.

The original report required defendant to establish through routes and joint rates with complainant between way landings on the Cumberland River and interstate points on defendant's line, and following this order such through routes and joint rates were established. Complainant now represents that defendant has not complied with other terms of the order and the case was reopened for further hearing. Complainant contends the interchange arrangements on less-than-carload shipments with defendant at Burnside are unduly prejudicial to complainant and unduly preferential of the Burnside & Burkesville Transfer Company. HELD, That the dispo-

sition of the use of defendant's facilities subjects complainant to an undue prejudice and disadvantage. Cumberland Trans. Co. v. C. N. O. & T. P. Ry. Co., et al., 45 I. C. C. 444.

Carriage of Livestock—Negligence of Veterinary.—A horse shipped by railroad was killed by a veterinarian called in by the carrier, in order to prevent further suffering, in the belief that the horse was fatally ill. Held, That it was error to instruct the jury that the carrier was liable if the veterinarian erred in diagnosis against recovery. The true rule is said to be that the carrier is liable for failure to exercise reasonable care and prudence in the selection of a veterinarian. Rosenberg v. N. Y. C. R. Co., 167 N. Y. Supp., 518.

Carriers—Refused Shipment—Liability of Consignor for Charges.—A shipment was refused by the consignee and the shipper was promptly notified of the refusal and asked to furnish disposition but failed to reply. Held, That the terminal carrier was entitled to recover from the shipper the freight charges for the entire movement, demurrage charges for a reasonable period (but not after it became improbable that defendant was going to furnish disposition), and storage charges which accrued after the car was released and the shipment put in a storage warehouse. It was no defense to the shipper that he was not the owner, nor that the bill of lading provided that the owner or consignee should pay the charges. Northern Pac. R. Co. v. Pleasant River Granite Co. (Me.), 102 Atl. 298.

Order Notify Shipment—Erroneous Delivery—Right of Carrier to Replevy.—An automobile was shipped consigned to shipper's order, notify Crowley. Draft, with bill of lading endorsed in blank attached, was deposited by the shipper in a bank for collection. Upon arrival of the shipment at destination Crowley was notified and at his request the car was placed at a suitable place for unloading. Crowley proceeded to unload it, without obtaining and surrendering the bill of lading, and sold it to an innocent purchaser. There was no evidence showing that the carrier intended to deliver the shipment to Crowley other than the placing of the car at his request. Claim was made by the shipper for the value of the automobile and paid by the carrier. The carrier then brought an action of replevin against the defendant, the innocent purchaser, to get possession of the automobile. Held it was entitled to recover. The court seemed to think that if the carrier had intentionally delivered the shipment to Crowley it would have been estopped to take it by replevy from an innocent purchaser. Chicago R. I. & P. Ry. Co. v. McElhany (Ia.) 165 N. W., 67.

Crossing Collision with Automobile.—The operator of a motor car of a railway company is under no obligation to stop his car because he sees, or might see, an automobile on the public highway approaching a grade crossing. He has the right to presume that the driver of the automobile will stop and not attempt to cross the track. The mere fact that he saw the automobile approaching is not sufficient to warrant a recovery. Kansas City, etc., Ry. Co. v. Shumaker, 245 Fed. 117.

Injury to Passenger—Defects in Street Adjacent to Station.—Where an intending passenger is injured by defects in a street adjacent to its ferry house, there is no liability on the part of the railway company where the defect is in the paving of the street ten or twelve feet distant from the property line of the railway company and where the company was under no obligation to make the repairs in the street and had no right to do so. Jackson v. Pennsylvania R. Co., 245 Fed. 551.

Transportation of Intoxicating Liquors Interstate as Personal Baggage.—Under the West Virginia law (Acts 1917, Chapter 58, Section 31) it is declared unlawful for any person to bring or carry into the State during any period of 30 consecutive days more than one quart of intoxicating liquors for personal use, and that it shall be unlawful for any carrier to knowingly carry for a passenger or knowingly permit a passenger to carry into the state more than one quart of liquor as personal baggage. By Act of Congress of March 3, 1917, Chapter 162, 39 Stat. 1058, Section 5, known as the Reed Amendment, it was declared unlawful for any person to cause intoxicating liquors to be transported in interstate commerce, with certain named exceptions, into any State or Territory the laws of which prohibit the manufacture or sale therein of intoxicating liquors.

The defendant was indicted because he carried as personal baggage one quart of intoxicating liquor from Kentucky into West Vir-

ginia for his personal use. In dismissing the indictment and discharging the defendant, the district court said:

> "It is to be noted that the sanctions of this act are directed against the ordering, purchasing, or causing intoxicating liquors to be transported in interstate commerce, and this brings us to inquire what is meant by interstate commerce. Webster defines commerce as: 'The exchange of merchandise on a large scale between different places or communities; extended trade or traffic.'
>
> "And he gives as synonyms the following words: 'Trade; traffic; dealing; intercourse; interchange; communion; communication.'
>
> "Of course, the question of the magnitude of the commercial transaction is unimportant, considered from a legal standpoint where the commerce is prohibited; but that the phrase 'interstate commerce' necessarily connotes interstate commercial dealings originating in one state and extending to another I am fully persuaded. I am quite as fully persuaded that, in the case at bar, no transportation of liquor in interstate commerce has been shown, but that, on the contrary, a mere interstate transportation of goods no longer in commercial existence, so to speak, has taken place in strict accord with the laws of the state to which such goods were transported.
>
> "'Commerce' is not a term synonymous with 'transportation,' and where an owner transports his goods personally from one state to another, not for purposes of trade, he is not engaging in commerce, and the statute does not apply. The indictment is doubtless good, and it is only the agreed facts that show that no conviction can be had upon it.
>
> "It is not necessary in deciding this case to consider the question whether Congress has power to regulate interstate transportation, where such transportation is not in commerce, because I do not find in the act any declared intention so to attempt to regulate or control such transportation; and it will be time enough to pass upon that question when, if ever, it arises."

United States v. Mitchell, 245 Fed. 601.

SLIPPING ON ICE-COVERED CAR-SILL—DOCTRINE OF "RES IPSA LOQUITUR" DENIED.—A passenger sued for injuries caused by slipping on the sill or threshold of a Pullman car while entering, alleging negligence on the part of the railroad company and the Pullman company in allowing the threshold to be uncovered so as to become coated with ice. The car was of the latest and most improved type of construction, in perfect repair, and the film of ice, if any, which caused the fall was so imperceptible that it could not be discovered without getting down on the floor and scraping the sill with a knife. The Utah Supreme Court held that in such circumstances the doctrine of *res ipsa loquitur* did not apply. It also held that the railroad company and the Pullman company were required to exercise only reasonable care for the safety of a passenger in discovering the presence of ice on the sill of a car, and if the ice could not be seen by an ordinarily reasonable inspection they were not liable to a passenger who slipped and fell. Judgment for defendants was affirmed. Connell v. Oregon Short Line R. Co. (Utah), 168 Pac. 337.

PASSENGER'S BAGGAGE—PROPERTY OF ANOTHER.—The Oklahoma Supreme Court, in an action for damages for the loss of a traveling salesman's sample trunk which had been checked by him in the baggage room and was destroyed by fire, holds that as the railroad company had knowledge of the relation between the passenger and his employers, the plaintiffs, the owners of the property, it was not liable to plaintiffs in the absence of gross negligence or willful misconduct. The court stated that the well settled general rule was as follows: The carriage of baggage is a mere incident of the carriage of the owner as a passenger, and ordinarily a carrier is liable only to the owner for loss or damage; and where a passenger procures the property of another to be carried as baggage, the carrier, if without knowlege of the true ownership, is a gratuitous bailee, and is liable to the owner only for loss or damage occasioned by gross or willful misconduct. Judgment for plaintiff was reversed. Rehearing denied. Lusk et al. v. Bloch et al. (Okla.), 168 Pac. 430.

ASSUMPTION OF RISK—DEFECTIVE ENGINE STEP.—Plaintiff sued to recover damages for injuries received by reason of slipping and falling from a defective step of an engine. The evidence disclosed that the plaintiff, before he was injured, made three trips, each time using this particular step. The court held that under the facts the defective condition of the step was so patent as to be readily observed by every one, and that the plaintiff assumed the risk. Judgment for defendant was affirmed. Barrett v. Virginian Railway Co., 244 Fed. 397.

CARRIERS—FLAG STATION—FAILURE TO STOP—PROXIMATE CAUSE OF INJURY.—The failure to stop a train at a flag station on signal of a woman wishing to take passage is not the proximate cause of her injury from falling into a cattle-guard while walking on tracks from station to her destination. The court cited with approval Garland v. Carolina, Clinchfield & O. R. Co., 172 N. C. 638, which held that "where a railroad company has negligently carried a female passenger a mile or two beyond her station, causing her to walk that distance to her home with a suitcase, because thereby her husband failed to meet her, damages sustained by her by reason of a storm coming up did not arise proximately from the carrier's tort, and cannot be included as an element of damage." Brown v. Linville River Ry. Co. (N. C.), 94 S. E. 431.

LIMITATION OF ACTION FOR UNDERCHARGE—MISSISSIPPI.—It is held by the Supreme Court of Mississippi that a claim by a carrier to recover from a shipper an overpayment made to the shipper by the carrier due to the misinterpretation of a milling-in-transit tariff is barred after three years under section 3099 of the Code of 1906. The opinion of the court is as follows:

> "We are of the opinion that the limitation of three years provided by section 3099, Code of 1906, governs; for the reason that the writings here in question, taken singly or collectively, do not set forth the terms of any contract entered into between the parties thereto, but simply show that appellee has collected from appellant a less sum of money for transporting lumber than under the law it should have, by reason of which, we will assume, the law imposes an obligation upon appellant to account to appellee for the difference between the money which it actually and that which it should have paid, thereby giving rise to a contract, the terms of which are not express, but are implied by law, so that the case comes squarely within Buntyn v. Building & Loan Assn., 76 Miss. 454, 38 South. 345."

D. S. Pate Lbr. Co. v. Southern Ry. Co. in Miss. (Miss.), 76 So. 481.

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THE MEMORANDUM

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LAW DEPARTMENT FEBRUARY, 1918. SOUTHERN RAILWAY COMPANY

"EMPLOYED IN INTERSTATE COMMERCE" AS CONSTRUED BY THE SUPREME COURT OF THE UNITED STATES.

Every lawyer who has occasion to consider cases arising under the federal Employers' Liability Act will readily agree that one of the most important and difficult problems usually presented is the question whether or not the employee, at the moment of the injury or death complained of, was engaged in interstate commerce. This question is, of course, almost exclusively one of fact. The chief difficulty, perhaps, that is usually met with in the attempt to solve the question is due to the fact that practically all railroad tracks, and a large proportion of other railroad facilities, are used in both interstate and intrastate commerce, so that the line of demarcation, the "twilight zone," between the two uses is necessarily uncertain and incapable of being reduced to a state of certainty. For instance, in the matter of repairs to machinery in a shop of a railroad company engaged in both interstate and intrastate commerce, where cars and locomotives used in both kinds of commerce are repaired, the question arises as to whether or not the workman engaged on the machinery may be considered as engaged in interstate commerce. Other situations giving rise to doubt along this line will readily present themselves to anyone having occasion to consider the subject.

The question, then, being one chiefly of fact, it follows that to a certain large extent the decision in each case will depend primarily upon the facts in that particular case; but much light may be thrown upon those facts, frequently, by careful consideration of what has been adjudicated by the higher federal courts in decided cases in which substantially similar facts have been involved.

Recent decisions of the United States Supreme Court indicate a tendency to determine such questions upon the circumstances surrounding the employee and the instrumentality of commerce involved at the precise time of the injury complained of. What has been the previous status of the employee or of the instrumentality, or what relation either or both may sustain to some subsequent act of interstate commerce, may of course be a consideration of considerable importance, and where an act is performed for the definite purpose of promoting an undertaking which is or will be in interstate commerce, the act is undoubtedly to be considered as performed in the course of employment in interstate commerce; but in the absence of a definite, fixed relation between the act concerned and the performance of an activity in interstate commerce, these antecedent or prospective circumstances are of value chiefly as throwing light upon the situation involved, rather than as fixing the status of the employee as engaged in the one or the other sort of commerce.

In a case decided in January 1916 (Shanks v. Delaware, Lackawanna & Western R. Co., 239 U. S. 556, 558), the court laid down a test, which was approved in another case decided in March, 1917 (New York Central R. Co. v. White, 243 U. S. 188, 192), of the question of employment in interstate commerce *vel non* under the terms of the act, in the form of the following inquiry: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Upon the answer to that question, therefore, in each case, will depend whether or not the injured employee's rights and liabilities, as well as those of the employer, will be considered as determined by the terms of the federal Employers' Liability Act.

A brief collection of cases, therefore, detailing as far as practicable the facts involved, with the idea that they may be helpful in

the consideration of other cases which may be similar, is all that is to be attempted in this discussion.

Employee Engaged in Switching.

A car engaged in intrastate commerce was included in a train engaged in interstate transportation, and was being set out by a brakeman, who was injured while the car was still attached to the engine. The court, holding that the brakeman was engaged in interstate commerce at the time of the injury, said (New York Central & H. R. R. Co. v. Carr, 238 U. S. 260):

> "The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey.
>
> "The case is entirely different from that of Ill. Cent. R. Co. v. Behrens, 233 U. S. 473, for there the train of empty cars was running between two points in the same State. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character."

In the case of Great Northern Ry. v. Otos, 239 U. S. 349, a switchman was engaged in shifting cars in the yard at a point in Minnesota, the cars having come into the State from the west, one destined to Minneapolis and the other to Duluth. The automatic coupler on the Minneapolis car was out of order, and the evidence indicated that it had been marked for repairs before going further. In the switching operation the plaintiff, due to the defective condition of the car, was badly hurt. It was argued on behalf of defendant that the car, having been marked for repairs, had been withdrawn from interstate commerce; that the Safety Appliance Act required it to remove the car for repairs, and that its effort to comply could not constitute a tort. It was further contended that the plaintiff was the person entrusted by defendant with the details of such removal and could not make it responsible for the mode in which his duty was carried out. The court, taking the opposite view, pointed out that the car was loaded and was in fact carried to Minneapolis the next day, and held that it had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination; that at the moment of the injury "it was accessory to switching the Duluth car;" and that it did not require "extended argument to show that the car still was subject to the Act of Congress."

Reference has already been made to the case of Illinois Central R. Co. v. Behrens, 233 U. S. 473, in the quotation above from the Carr case. Behrens's intestate was employed on a switch engine operated exclusively within the city of New Orleans. The general work of the crew consisted in moving cars, sometimes loaded, sometimes empty, and sometimes mixed, from one point in the city to another. In the case of the loaded cars, sometimes the freight was destined from within the State to points without the State, or *vice versa*; sometimes it was entirely intrastate freight, and sometimes it consisted of both classes. After detailing these facts as to the usual employment of deceased, the court disposed of the case as follows:

> "Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

In Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, deceased employee had been engaged, at the time of his fatal injury, in

switching certain coal belonging to the railroad company from a storage track to a coal shed. After being thus placed, the coal was supplied to all locomotives needing it at that point, whether engaged in interstate or intrastate commerce. The court held that it was not important whether deceased had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty, it was pointed out, was solely in connection with the removal of the coal from the storage tracks to the coal shed, and the only ground for invoking the federal act was that some of the coal thus placed was to be used by locomotives in interstate hauls. The court said:

> "As we have pointed out, the federal act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it' (citing Shanks v. Delaware, L. & W. R. Co., *supra*). Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the federal act (Del., Lack. & West. R. R. Co. v. Yurkonis, 238 U. S. 439), and there is no distinction in principle between the two cases."

Employee Engaged in Repairs.

The reasoning of the court in Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, seems to have been overturned by later decisions. In that case plaintiff and another employee, acting under a foreman, were carrying certain bolts from a tool car to a bridge, the bolts to be used by them late that night or early next morning in repairing the bridge, which was used in both interstate and intrastate commerce. The only way by which they could reach the bridge was by means of an intervening temporary bridge, which was also used in both interstate and intrastate commerce. The plaintiff, while carrying a bag of bolts over the temporary bridge, was run down by an intrastate train and injured. The court held that the repair of the bridge was necessary for the carrying on of interstate commerce, and that the carrying of the bolts for the purpose of repairing the bridge "was a minor task which was essentially a part of the larger one," and that therefore the plaintiff was engaged in work that was a necessary part of interstate commerce.

The later case of Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, does not go so far. In that case the railroad company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter-shaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work.

The court, holding that plaintiff was not employed in interstate commerce within the meaning of the act, said:

> "The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.
>
> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. v. United States, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to

it as to be practically a part of it?

* * * * *

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

As indicated in this opinion, a distincton is to be drawn between repairs to an engine, car, or other instrument, sometimes used in interstate commerce and sometimes in intrastate commerce, and repairs to such instrument while engaged in such commerce or merely stopped for repairs, as well as to a roadbed, bridge, or other facility permanently devoted to interstate transportation. In the case of Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, plaintiff was injured while repairing an engine which "had been used in the hauling of freight trains over defendant's line, which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." In holding that the employee was not engaged in interstate commerce, the court said:

"The last time before the injury on which the engine was used was on October 18 when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out of the same place. That is all we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

Where an employee was wheeling coal to heat a shop in which repairs were being made to cars that had been and were to be used in interstate commerce, the Supreme Court of Minnesota held, on the authority of the Pederson case, *supra,* that the employee was engaged in interstate commerce. "That an employee carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pedersen case decides," says the state court. "It seems no extension of the construction thus given to the statute to hold that an employee carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated. It is not material what our own views are on the proper construction of the federal statute. We are bound by the decisions of the Supreme Court of the United States."

But the Supreme Court of the United States reversed the Minnesota court, on the authority of the Yurkonis case, 238 U. S. 439, and the Shanks case, supra. Illinois Central R. Co. v. Cousins, 241 U. S. 641.

Employee Engaged in Construction.

In Raymond v. Chicago, M. & St. P. R. Co., 243 U. S. 43, plaintiff sued the railroad company for damages resulting from injuries sustained while engaged in the construction of a tunnel. The petition alleged that defendant operated an interstate railroad, and that for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service it was engaged in cutting the tunnel in question. Plaintiff was employed in the tunnel as a laborer and

while at work, it was alleged, his pick struck a charge of dynamite which through defendant's negligence had not been removed. The injuries resulted from the ensuing explosion. The court held that Raymond was not engaged in interstate commerce, saying:

> "Considering the suit as based upon the federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered and consequently no cause of action was alleged under the act."

A night watchman, in the case of New York Central R. Co. v. White, 243 U. S. 188, was employed by the railroad company, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. He was killed while on duty, at a place not outside of the limits prescribed for the performance of his duties. The court said:

> "The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce does not bring the case within the federal act. The test is, 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' * * * Decedent's work bore no direct relation to interstate commerce, and had to do solely with construction work."

Miscellaneous.

While, of course, no attempt is made to present an exhaustive catalogue of cases under this head in which the question of employment in interstate commerce is involved, the cases listed below may be of some interest in this connection.

The employee has been held not to be employed in interstate commerce, in the opinion of the Supreme Court of the United States, where he was employed on a logging railroad, the owner of which carried its own logs on its own cars from its own timber land in the State to a tidewater point, where the logs were dumped into the water, some of them going beyond the State (McCluskey v. Marysville & N. R. Co., 243 U. S. 36); where he was engaged in a colliery, operated by the railroad company, in mining coal to be used in the company's locomotives moving in interstate commerce (Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439); where he was employed as a yard conductor by an interstate railroad and, having executed all his orders, rode on a freight engine on his way to report to the yardmaster for further orders, and was injured in alighting from the engine, regardless of the nature of the work the orders he would have received would have required of him (Erie R. Co. v. Welsh, 242 U. S. 303); where he was employed as one of a crew in transporting a new outhouse to a depot already in use on an interstate railroad, for the purpose of installing such outhouse to take the place of one previously in use at the depot (Minneapolis & St. L. R. Co. v. Nash, 242 U. S. 619); where he was engaged in spraying paint, by means of a "paint gun," on engines and cars, some of which were used in interstate commerce, the injury being due to his breathing the paint-laden air caused by the operation of the machine (Baltimore & Ohio R. Co. v. Branson, 242 U. S. 623).

The employee has been held to be engaged in interstate commerce within the meaning of the act, where a fireman, after inspecting, oiling, firing, and preparing his engine for starting on a trip to another State, but before the engine had been attached to any of the cars of the train, attempted to cross certain tracks which intervened between the engine and his boarding house, and was struck and killed by an engine running on one of these tracks (North Carolina R. Co. v. Zachary, 232 U. S. 248); where the engineer of an interstate train, after finishing the going trip of his run, left his engine in the yard near the roundhouse, was detained in the yards for a time, went to the boarding house patronized by the railroad men, found it full, and went back to the round house into an engine and went to sleep; he was awakened the following morning when the engine upon which he had gone to sleep was run to the coal chute; he asked where his engine was, and, upon being given the information, started on foot in that direction; later he was found in an open, uncovered pit in the roundhouse, dead, his engine, standing over the pit, unlighted (Seaboard Air Line R. Co. v. Padgett, 236 U. S.

668); where one is employed as a yard clerk, his duties being to examine incoming and outgoing trains and make a record of the numbers and initials on the cars, to inspect and make a record of the seals on the car doors, to check the cars with the conductor's lists, and put cards or labels on the cars to guide the switching crews in breaking up incoming trains, and making up outgoing trains, some of the cars being intrastate and some interstate (St. Louis, S. F. & T. R. Co., v. Seale, 229 U. S. 156); where a brakeman was injured while coupling an engine to a dining car, which was being placed for the return portion of an interstate run, the car containing no passengers, but being stocked and ready for use on the return trip (Johnson v. Southern Pac. R. Co., 196 U. S. 1); where the employee was injured while clearing up a wreck which blocked the movement of interstate trains (Southern R. Co. v. Puckett, 244 U. S. 571).

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February 4, 1918.

Liability of Consignor For Undercharge —Estoppel.—Defendant shipped a carload of merchandise from Beaver Falls, Pa., to Inola, Okla., consigned to its own order. Prior to arrival of the goods at destination the shippers negotiated the bill of lading to Stewart & McNames, who thereby became and were owners of the goods when they arrived at destination. The bill of lading provided that the owners or consignees were to pay the freight and as between shipper and Stewart & McNames the latter were to stand the freight charges. The shipment was delivered by the carrier to Stewart & McNames, but through error in computation $176.72 less freight charges were collected than was due by the tariffs lawfully established. The error was discovered and the carrier called on the defendant to pay the undercharge. In the meantime, however, Stewart & McNames, had become insolvent. The court held that while defendant may not have been liable for the undercharge *as consignee* (on account of having assigned the bill of lading to Stewart & McNames while the shipment was in transit), nevertheless it was liable as *consignor;* and that the carrier was not estopped to sue for the undercharge because of its negligence which resulted in the defendant's rights over against Stewart & McNames having become worthless. Bush v. Keystone Driller Co. (Springfield (Mo.) Ct. of App), 199 S. W. 597.

Railroads—Crossing Accidents—Contributory Negligence.—A person cannot recover for injuries received by being struck at a crossing where the evidence shows that he drove upon the crossing after looking for train some 30 feet from track, where trees prevented view, and took no further precautions. The court said:

> "It is equally well established that the failure of the defendant to whistle or ring its bell did not relieve plaintiff of his duty to look and listen for the approaching train, and that such duty is not discharged by observation made at a point where obstructions make it impossible to ascertain if a train is approaching, where, after passing such obstruction, he could by looking and listening satisfy himself whether it is reasonably prudent to attempt to cross the line."

Nucci v. Colorado & S. R. Co. (Colo.), 169 Pac. 273.

Carriers—Liability of Railroad for Misrepresentation in Sale of Mileage Book.—Where plaintiff purchased from defendant's agent a mileage book having stamped thereon that it would not be good over a certain line, defendant was not liable for refusal of such line to accept coupons, although defendant's agent represented that coupons were good over such line. The right to use the mileage is controlled by the tariffs filed with the Interstate Commerce Commission. Alabama G. S. R. Co. v. Vermillion (Ala.), 77 So. 67.

Damaged Shipment—Measure of Damages—Offsetting Freight Charges.—Where a shipment arrives at destination, the owner has no right to refuse it unless it is practically worthless. The measure of damages recoverable in such a case is the difference between the market value of the goods at the time, and in the condition in which, they should have arrived, and their market value at the time, and in the condition in which, they did arrive. The consignee cannot increase this measure of damages by refusing to accept the goods.

The carrier having sold the refused goods for charges according to law, and applied the proceeds in part payment of the transportation charges, may make claim for the balance of the charges as an offset, in the owner's action of damages. Quanah, Acme & P. R. Co. v. Novit (Tex. Civ. App.), 199 S. W. 496.

INTERSTATE COMMERCE COMMISSION DECISIONS.

LACK OF TARIFF AUTHORITY.—Carload shipment of lumber from Cass Lake, Minn., to Detroit, Mich., via Great Northern Railway, Chicago, Burlington & Quincy Railroad, care of Pere Marquette, Michigan Central delivery. The Marquette refused to deliver to the Michigan Central at Detroit for switching until the line-haul charges were paid or guaranteed. After considerable correspondence complainant guaranteed the line-haul charges and shipment was delivered March 7, 1914, after demurrage charges had accrued. Complainant had, however, given an order on February 2, 1914, to the Michigan Central at Detroit, to deliver shipment to the Murphy Iron Works Company, that concern being on that carrier's credit list. Neither the Marquette's tariffs nor those of the Michigan Ceneral appear to have provided for the payment of freight charges as a prerequisite to the release of cars to the switching line. The line-haul carriers concurred in a joint rate to Detroit. The Michigan Central did not concur in the joint rate over the route of movement, but the defendant's tariffs provided for the absorption of the switching charges at Detroit. The line-haul carriers had contracted to deliver the shipment to the Michigan Central. HELD, That the course pursued by the Marquette was not justified. Alexander Bros. Lbr. Co. v. Pere Marquette R. R. Co., et al., 47 I. C. C. 69.

REFUSAL TO PLACE CARS FOR LOADING JUSTIFIED.—Complainant is engaged in the lumber business at Westel, Tenn., and alleges that defendant's refusal to place at a point on Baker mine switch, a spur track leading off from defendant's main line about 2½ miles south of Rockwood, Tenn., cars necessary for loading 75 cords of tan bark destined to Cincinnati, Ohio, in accordance with its agreement with complainant, was unreasonable and unjustly discriminatory. The point at which complainant desired the cars placed is on a steep grade where it is dangerous to leave cars, but some cars which had been placed there ran down and forced cars onto the main line and wrecked them, after which defendant refused to furnish complainant any more cars at that point. Due to a misunderstanding one car was subsequently placed at complainant's shipping point for another shipper, who looked after its safety until it was removed. Defendant has discontinued the shipping point in question. HELD, That no unjust discrimination, or other violation of the act, is shown. O. C. Kindred v. Cincinnati, N. O. & T. P. Ry. Co., 47 I. C. C. 73.

IDENTITY OF SHIPMENT FOR EXPORT.—Complainant shipped several carloads of lumber to New Orleans for export. The lumber was held at Press street station three days and on cars on the defendant's tracks about twenty days. Arrangements had been made for the ocean transportation but upon the outbreak of the war the sailing dates were canceled. To avoid further demurrage complainant rented Simms's barn to which the cars were switched and the lumber stored; the lumber from each car being stacked and kept in separate stalls and kept intact. Later vessel space was engaged and the separate car lots reloaded, switched at shippers' expense for delivery to ocean carriers, and exported to various European destinations. The inbound carriers collected demurrage charges on basis of 24 hours free time applicable to domestic shipments held for switching orders. At the time of movement defendant's demurrage tariffs provided an allowance at New Orleans of 10 days free time on cars containing export freight. This allowance applied only to cars while on tracks of the road by which shipment is transported to port of export and does not apply after such cars are switched to a track on another line.

The carriers claim the character of the shipments was changed when transferred to the barn, but the Commission HELD, That the shipments were for export, and that the demurrage charges were therefore unlawfully assessed. Newman Lumber Co. v. New Orleans & N. E. R. Co., et al., 47 I. C. C. 33.

INITIAL CARRIER RESPONSIBLE FOR FAILURE TO HAVE JOINT RATE.—Two carloads of club-turned spokes moved from Delhi, La., to Memphis, Tenn. The shipments were unrouted and moved over the Vicksburg, Shreveport & Pacific, to Vicksburg, Miss.; Alabama & Vicksburg to Meridian, Miss.; Mobile & Ohio, through Corinth, Miss., to Cairo, Ill., and back to Corinth; thence Southern Railway to destination, 812 miles. The direct route was over V. S. & P. to Vicksburg and the Yazoo & Mississippi Valley beyond, 259 miles. No rate on spokes applied over this route, but a joint rate of 12

cents was applicable on hickory lumber, which rate was increased to 14 cents effective February 23, 1915. On April 26, 1913, a joint rate of 15 cents was established over the direct route on club-turned spokes. These rates are still in effect. The Vicksburg, Shreveport & Pacific admitted the rate charged was unreasonable to the extent it exceeded the present rate of 15 cents over the direct route. Complainant seeks reparation upon the basis of the rate applicable on hickory lumber over the direct route at the time of movement, and the establishment of a rate over that route for the future. HELD, That the club-turned spokes were entitled to the lumber rate; that the reasonable route would have been the route via the Vicksburg, Shreveport & Pacific Railway to Vicksburg and the Yazoo & Mississippi Valley beyond. That a rate of 12 cents would have been reasonable and should have been in effect; and that the responsibility for the failure to have such a rate over the route named rests upon the Vicksburg, Shreveport & Pacific, which road should pay the reparation. Memphis Freight Bureau, for Weis & Lesh Mfg. Co., v. Alabama & Vicksburg Ry. Co., et al., 45 I. C. C. 121.

Master and Servant—Safe Place to Work—Place Made Dangerous by Work.—The general rule of law that it is the duty of the master to exercise ordinary care and diligence in providing a reasonably safe place of work for his servants does not apply to a case where the very work for which the servant is employed is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the work proceeds must be regarded as being the ordinary dangers of the employment, and the servant necessarily assumes them. In this case the employee was engaged in dismantling a bridge. Louisville & Nashville R. Co. v. Dunn (Ga.), 94 S. E. 661.

Master and Servant—Federal Employers' Liability Act—Joint Action Against Employer and Engineer.—An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the federal Employers' Liability Act where the concurring negligence of the railroad and its engineer in interstate commerce is alleged as the cause of the injury, and where a violation of the Safety Appliance Act is also charged against the railroad. Lee v. Central of Ga. R. Co. (Ga.), 94 S. E. 558.

Reciprocal Demurrage—Right of Agent Ordering Cars To Recover.—Plaintiff, an agent for another person, ordered cars in his own name, without disclosing his agency. The goods intended to be shipped belonged to the principal and were shipped by him in his own name. The plaintiff brought an action against the railway company to recover reciprocal demurrage under the rules of the Georgia Railroad Commission for failure to promptly supply the cars ordered. HELD, that the remedy is in favor of the shipper only, and plaintiff could not maintain his action. Central of Georgia R. Co. v. Rabun (Ga. App.), 94 S. E. 598.

Assumption of Risk—Switchman Injured at Curve.—At the point where the railroad track ran alongside a coal bin, about four feet from such bin, there was a 30-degree curve, where the middle part of the car swung much nearer the bin that on the straight part of the track. Plaintiff, a foreman switchman engaged in moving a car on the spur, was standing at such a point that, nothwithstanding the efforts of the trainmen to prevent injury when they saw his dangerous position, he was caught between the car and the coal bin. It was held by the Supreme Court of Missouri that inasmuch as there was nothing in the evidence to indicate that the company did not do its best, consistently with successful operation, in the location and construction of the spur in question, it would be presumed that it did. A railroad is not required so to construct a track in relation to the physical features of the industry served that switching would be absolutely safe even to careless employees. A switchman of 19 years' experience would be held to know that, in a case like this, the body of a car moves toward the inside of a curve. The plaintiff was held negligent in assuming the position of danger and unnecessarily remaining after his reason for taking it had ceased; he owed the railroad the duty to suggest a change in the track if one was necessary, and if not he assumed the risk. Norris v. Pryor (Mo.), 198 S. W. 817. Rehearing denied.

OFFICE NOTES AND COMPILATIONS OF AUTHORITIES.

EDITORIAL NOTE.—In the course of the work of the staff of the General Counsel, a large number of legal notes and compilations of authorities have been prepared from time to time. It is proposed to publish some of this material in this column of THE MEMORANDUM for the purpose of preserving it in convenient form and for the benefit of counsel. It will be printed as of the date of preparation.

IS A RAILROAD COMPANY LIABLE FOR MISREPRESENTATION OF A TICKET AGENT AND, IF SO, WHAT IS THE MEASURE OF DAMAGES?

The general principle is stated in 31 Cyc. 1566 with regard to liability of principal for an agent's representations, as follows:

> "A principal is generally bound by the contracts made for him by his agent, and acts of the agent in connection therewith, while acting in the course of his employment and within the scope of his actual or apparent authority."

The measure of damages for breach of contract is

> "The general rule as to the measure of damages in case of a breach of contract, where there is no bad faith or fraud in evidence, is the amount of damages which naturally result or flow from the breach complained of; and must be such as the parties contemplated as a probable consequence of a breach, and which are capable of being reasonably ascertained. In other words the measure of damages is the damage which actually results from the breach, and which will compensate the party for the injury sustained, together with the expense or cost to which he may have been subjected as a consequence of the breach. In such actions the question is not what the plaintiff paid because of the breach but the value of that for which he paid. Remote, speculative, or consequential damages are not allowed, unless they can be traced solely to the breach of the contract, or are capable of exact computation. Thus speculative profits are too remote to be included in the estimate of such damages."

In Turner v. Great Northern Ry. Co. (Wash.), 55 Am. St. Rep. 883, the plaintiff purchased from a union ticket agent tickets for himself and wife from St. Paul to Spokane by way of Seattle on May 20, 1894, being induced to do so by the representation of the ticket agent that a certain train would leave on the same day and reach Spokane on June 2, whereas the plaintiff and his wife could not do so because of a portion of the road being out of repair and this situation was known by the station agent. The court held that a ticket seller authorized to sell tickets for several railroads, of which the defendant was one, binds the company by his representations and that prospective passengers have the right to rely upon these representations. It was also held that the plaintiff was entitled to damages for the delay, including expenses, but not for worry, disappointment or inconvenience.

St. Louis & S. W. R. Co. of Texas v. White (Tex.), 89 S. W., 746, held that when a prospective purchaser of tickets asked an agent of a railroad company for tickets over the best route to a certain point stating that his wife was in delicate health and he wished to travel the quickest way and the route with the fewest changes, and the agent represented that a certain route was the best when in fact it was not, the defendant in error was entitled to damages resulting from the injuries to his wife because of a greater number of changes due to taking the route indicated by the agent and for all damages proximately caused by the agent's misdirection.

Atkinson v. So. Ry. Co. (Ga.), 23 Am. & Eng. R. R. Cases (N. S.) 651, holds that a representation of an agent that a certain train will stop at a certain station and did not, entitled the purchaser of the ticket to recover, if he was expelled from the train, solely on the ground that the train did not stop at the station in question. The Court said:

> "When a railroad company places an agent in charge of its business at a place where passengers are expected to board its trains, and authorizes such agent to sell tickets to passengers to be used when taking passage upon its trains, one who purchases from such an agent a ticket upon which there is no statement as to what trains it will or will not be good for passage upon has a right to presume that the agent is authorized by the company to give him information as to what

> train or trains the ticket will be good for passage upon, and the agent gives him this information, he has a right to act upon the information so given. If in so doing he boards a train of the company upon which the ticket is not good for passage to the point indicated thereon, and is for this reason expelled therefrom by the agent of the company in charge of the train, the company is liable to him for whatever damages he may sustain on account of such expulsion, notwithstanding there is in existence a rule or regulation of the company which prohibits the conductor from carrying passengers on the train thus boarded, or from carrying passengers to a given point along the line of the road. The company can only avoid this liability by showing that the purchaser of the ticket knew, or had sufficient reason to believe, that the ticket agent was misinforming him, or that the purchaser knew of a rule of the company which made the agent incompetent to give the information, or forbade the recognition of the ticket by the conductor."

In Illinois Central R. Co. v. Hooper (Miss.), 33 Am. & Eng. R. R. Cases (N. S.) 612, a Mrs. Hooper purchased a ticket upon telling the ticket agent that she wished to go from Henderson, Ky., to Water Valley, Miss., by way of Grenada, Miss. There were two routes to Water Valley and the ticket agent informed Mrs. Hooper that there was no difference in the price. Her ticket, after being honored by one conductor, was turned down by another who put her off the train and she had to spend the night at Fulton. Her actual damages were seventeen dollars and the jury returned a verdict of $817.00. Judgment was reversed on the ground that the jury found the verdict upon the first count which stated a cause of action for exemplary damages, but in which the plaintiff claimed actual damages only. The court, however, stated that she was entitled to punitive damages but could not because the plaintiff claimed only actual damages in the count under which she recovered.

In Wilcox v. Southern Ry. Co. (S. C.), 74 S. E. 122, a ticket collector on the train gave the plaintiff information to the effect that he could stop off at a certain station and catch a later train that day. He had to wait over until the next day. The lower court allowed actual damages. The plaintiff appealed on the ground that, as alleged in the declaration, the ticket collector willfully and wantonly gave him misinformation. The evidence did not sustain this and the court stated that willful or wanton disregard of the rights of others cannot be presumed from mere proof of error or mistake.

Latour et al. v. Southern Ry. (S. C.), 51 S. E. 265, holds that the statement, upon sale of a ticket by an agent, that a train will make close connection at a certain station, is not a guaranty of such connection, the Supreme Court of South Carolina saying, on page 266:

> "(e) The defendant was certainly bound by the representation of its agent, and his honor committed no error to charge that it did not guaranty connections, and further instructed the jury that railroads do not guaranty connections."

In other words, the railroad, although it does not guarantee a connection, still is liable for the representations of its agent.

In Virginia the questions under consideration are well settled. In Fowlkes v. Southern Ry. Co., 96 Va. 742, the lower court held that the railroad company was liable upon a statement by its agent that one of its trains would make a close connection with a train of another road at a certain junction point where, in fact, the connection was not made. The plaintiff, upon finding that there was no connection, she being in a pregnant condition, took a carriage to her destination with the result that she had a miscarriage. The lower court held that the railroad company was liable for only damages arising out of the proximate cause of the delay or was guilty of negligence arising from the consequence which ought to be foreseen in the light of attending circumstances. The Supreme Court of Appeals held, on page 747:

> "The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences which supervened. It might reasonably have been anticipated that a failure to make the connection at Mosely Junction would involve delay

and inconvenience, but not that the plaintiff would procure a buggy, and in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result."

It is, therefore, obvious that a railroad company is responsible for the representations of its agents, but only to the extent of damages arising from such circumstances as a prudent and experienced man, fully acquainted with the circumstances, could have foreseen or reasonably anticipate.

AUTHORITIES THROWING LIGHT ON LIABILITY OF CARRIER FOR MISREPRESENTION BY ITS TICKET AGENT WITH RESPECT TO CONNECTION WHICH PASSENGER CAN MAKE AT JUNCTION POINT WITH LINE OF ANOTHER CARRIER.

Turner v. Great Northern Ry. Co., 15 Wash. 213, 55 Am. St. Rep. 883.

St. Louis, etc., R. Co. v. White (Tex.), 89 S. W. 746, 99 Tex. 359, 43 Am. & Eng. R. R. Cas. (N. S.) 796.

Latour v. Southern Ry. Co., 71 S. C. 532, 51 S. E. 265.

Dresser v. Canadian P. Ry. Co., 116 Fed. 281, 53 C. C. A. 559.

Fowlkes v. Southern Ry. Co., 96 Va. 742.

Atkinson v. Southern Ry. Co. (Ga.), 39 S. E. 888, 23 Am. & Eng. R. R. Cas. (N. S.) 651.

Wilcox v. Southern Ry. Co. (S. C.), 74 S. E. 122.

Illinois Central Railroad Co. v. Hooper (Miss.), 35 So. 764, 33 Am. & Eng. R. R. Cas. (N. S.) 612.

See Note on "Liability of Railroad Company for the Negligence, Mistakes, and Misrepresentations of Ticket Agents," 122 Am. St. Rep. 638.

See Note on "Passenger's Right to Rely upon Ticket Seller's Representation," 61 Am. & Eng. R. R. Cas. (N. S.) 337; "Representations Made After Sale of Ticket," Ib. 344.

1912.

RAILROADS—FIRE SET OUT BY SPARKS—VALIDITY OF LEASE OF RIGHT OF WAY.—A railroad leased a portion of its right of way to be used for storing ties, the lease providing as a part of the consideration that the lessee released all claims for damages on account of fire caused by the operation of the railroad on or near the premises, whether the damage occurred on the premises leased or on premises adjacent thereto. A spark from a locomotive on a spur track closely adjacent to the track extending into the leased land set fire to and destroyed certain ties. It was held by the Supreme Court of Illinois that the lease was not invalid as against public policy; that the use of the land leased for storage purposes was not a public utility. A "public utility" must be such a use as is common and has the same terms, however few the number who avail themselves of it, though it may be limited to the inhabitants of a small village. And the act of the railroad company in leasing land used as part of its right of way cannot be attacked as *ultra vires* on the ground that the land cannot be held by it for such purpose by any party except the State, whether the real estate has been acquired for the authorized uses or not. Judgment for defendant was affirmed. Bartee Tie Co. v. Jackson (Chicago & E. I. R. Co.), 117 N. E. 1007.

FREE TRANSPORTATION—CARRYING STATE OFFICERS.—In an action involving the consideration of the constitutionality of a statute of New Jersey requiring railroad companies to carry certain state officers and employees free, the New Jersey Court of Errors and Appeals holds that even though the State, in the charter of the railroad company, reserved the right to amend, alter, or repeal the charter, it cannot by virtue of such right impose on the railroad company the burden of carrying free of charge state officers, inasmuch as such burden works a deprivation of the railroad company's property without due process of law. Napier v. Delaware, L. & W. R. Co. (N. J.), 102 Atl. 444.

RAILROADS—INJURIES ON RIGHT OF WAY—FAILURE TO FENCE.—A railroad company is not liable to a person for injuries sustained by falling into a turntable pit, located upon the railroad's right of way near a path, as the company owed the public no duty of fencing the right of way or warning the public away from its turntable. Hendricks v. Kansas City Sou. R. Co. (La.), 77 So. 130.

ASSUMPTION OF RISK—FAILURE TO FURNISH TOOLS.—The Iowa Supreme Court holds that a railroad company is not guilty of negligence in failing to furnish section men with grappling hooks to move ties 12 feet long and 8 or 9 inches square, which weighed about 150 pounds, where it appeared that the four men moving and piling the ties could do so without such tools. Nor was the company bound to warn or instruct its section men as to their duty in moving and piling the ties. A servant assumes the risk of injury from strains in lifting heavy weights, it being assumed that he should be the best judge of his own lifting capacity. Rook v. Davenport, R. I. & N. W. R. Co. (Iowa), 169 N. W. 419.

RAILROADS—INJURIES ON CROSSING—CONTRIBUTORY NEGLIGENCE—RIGHT OF PRECEDENCE.—Where decedent drove his automobile on a railroad crossing, when, if he was not guilty of negligence, he must have seen the headlight of an approaching train, and known that the train was approaching, and that it was dangerous for him to attempt to cross, his negligence barred any right to recover, unless the negligence of the railroad caused him to place himself in such a perilous situation as to produce mental terror, incapacitating him from acting normally. The right of precedence at a railroad crossing is given to the train as between it and an automobile driver or other user of intersecting highway. Baker v. Collins et al. (Tex.), 199 S. W. 519.

RAILROADS — SWITCHING OPERATIONS — DUTY TO WARN PERSONS ON TRACKS.—In this case the Supreme Court of Tennessee holds that the precautions prescribed by statute for the prevention of accidents do not apply to railroads while doing switching in yards. Chattanooga Station Co. v. Harper (Tenn.), 199 S. W. 394.

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THE MEMORANDUM

Vol. III No. 8

LAW DEPARTMENT MARCH, 1918. SOUTHERN RAILWAY COMPANY

GUARD-RAILS ON BRIDGES—NECESSITY AND SUFFICIENCY.

There frequently rests upon railway companies the same duty with respect to the construction and maintenance of highway bridges and their approaches as is imposed by statute or otherwise upon counties and municipalities. This duty is generally expressed as requiring the erection and maintenance of such structures as the circumstances of the particular case require for the safety of travel thereon. Oftentimes it becomes a question of whether there should have been a railing or barrier, and also more often as to the strength and stability of the guard-rail. (15 Am. & Eng. Enc. of Law, (2nd ed.), 426-7). Some of the decisions apparently leave the determination of these questions to the jury in each particular case, but it is believed to be a correct statement of principle that even in those cases where the dangers of travel require the erection of guard railings, as is always the case on overhead bridges, and frequently on approaches thereto, such railings are only to protect the traveler from dangers arising from the usual and ordinary use of the roadway, and not from unusual or extraordinary uses thereof, and the determination of the question whether the railing is sufficient or not becomes a matter of law for the court.

While there is not a uniformity of decisions upon this question, some of the cases leaving these matters to the jury, yet there are quite a number of cases holding that the rail is only intended to indicate the limits of the roadway, and to serve as a guide for the traveler; that it is intended to protect against only the dangers resulting from the usual and ordinary use of the roadway by the traveler, and not against those arising from unusual and extraordinary uses. In many of the cases of the latter kind the question has been decided to be one of law, and this is believed to be the correct rule.

A number of leading cases in several different jurisdictions which support this view are hereafter referred to and digested.

In Wasser v. Northampton County (Pa.), 94 Atl. 444, the plaintiff was injured when his automobile, driven at a speed of from 20 to 25 miles per hour, ran through a guard-rail and over an embankment. A compulsory nonsuit was entered in the lower court, which was affirmed by the Supreme Court. The latter court, in discussing the kind and character of guard-rail, lays down the rule as follows:

> "There is no hard and fast rule as to the kind and character of a guard rail or barrier to be erected so that the highway may be deemed reasonably safe for the ordinary needs of travel. Public roads are intended for ordinary travel; if they meet the requirements which their ordinary uses demand, the authorities in charge of them have performed their duties under the law, and cannot be made answerable in damages for extraordinary accidents occurring on them. Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733. Township officers are not bound to anticipate and provide against the happening of accidents under extraordinary circumstances."

In answering the contention that the guard-rail was defective in the sense that it was not strong enough to prevent an automobile running at high speed from going over the embankment, the court says:

> "It has never been declared to be the law in this State that a township must erect guard rails or barriers, at points where the public highway runs near an embankment, so strong as to stop an automobile running at the rate of 25 miles an hour. To do this would require the building of solid walls of ma-

sonry, the expense of which would be a very onerous burden for any township to bear in a rural community. The law does not contemplate the building of such a barrier or guard by counties, or townships, in county districts, and the proper and ordinary uses of the highways in such communities do not demand this extraordinary protection to the traveling public."

In McClain v. Garden Grove, 83 Iowa 235, 48 N. W. 1031, 12 L. R. A. 482, in affirming a directed verdict in favor of the defendant, the court noted that the railing of the bridge was about 2½ feet high, and that it might be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided, but held that defendant was not an insurer against accidents, further saying:

"It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended."

The steering-gear of plaintiff's automobile becoming out of order, he lost control of the car, which turned out of the roadway proper and struck a temporary board fence along the side of a bridge. The fence failed to hold the car, and it fell about 35 feet, causing plaintiff's injuries, for which he sued. The lower court dismissed the complaint, which was affirmed in the Supreme Court. After disposing of a number of authorities by showing that in each case cited the plaintiff was allowed to recover because his injuries were due to defects in the street or bridge while the use to which it was being put by the person was the ordinary and reasonable use for which it was intended, the court said:

"In the case before us it is clear that for all ordinary uses of the street reasonably to be anticipated, it was kept in a safe condition, and that if appellants' car had been equally fit for its intended purposes the accident would not have happened. The defect in the car itself was plainly the proximate cause of the injury. The breaking of the railing was a mere condition. It could not reasonably be anticipated that a car, by reason of its own defects, would be driven over the curb, across the walk for pedestrians, and through the wooden railing at the side of the street. To hold the municipality liable in such a case would be to make it an insurer against every accident on its streets—in effect an insurer of the tractability of every team and automobile driven on its streets.

* * * * * * * * * * * *

"The decisions of this court in Teater v. Seattle, 10 Wash. 327, 38 Pac. 1006, and Dignan v. Spokane County, 43 Wash. 419, 86 Pac. 649, are in harmony with the decisions above discussed. In each of those cases, it is true, was involved the excessive force of a runaway team. Such a contingency, however, is no more extraordinary nor less to be anticipated than the eccentricities of an unmanageable automobile."

Swain v. City of Spokane (Wash.), 162 Pac. 991.

In an action to recover damages for the death of a person claimed to have resulted from the want of a sufficient barrier along the bank of a river, it appeared from the evidence that there was a fence at that point made of posts about a rod apart, with two wires on them. In affirming a judgment sustaining a demurrer to the complaint, the court said:

"The circumstances of the case indicate that either the team or the wagon of the deceased came in contact with a fence post of ordinary size and strength and broke it. The real question presented by the facts of this case is whether the township trustee was bound to take notice that the fence was an insufficient barrier. In most cases, and under ordinary circumstances, it would seem that such a fence would be an ample warning to keep persons driving along the road from running off the bank. It would seem that horses under ordinary circumstances would be checked by it until they would see and avoid the danger. What impelled Dougherty's horses to rush over and break down the fence is a mystery wholly unexplained by the evidence. The township trustee was not bound to guard against all possible contingencies, all improbable conduct, but only against such dangers as he was notified of.

> There would seem to be, in reason, a distinction between defects in the traveled way itself, which must be encountered by persons traveling over it, and those dangers which arise merely from the proximity of cuts, washouts and pitfalls. Township authorities may well be held to much more strict performance of their duties in maintaining the safety of the traveled track than in providing against the more remote contingency of dangers to be encountered by those who leave it, and go into unsafe places not prepared or intended for travel."

McFarland v. Emporia Township (Kan.), 53 Pac. 864.

> "The county is obligated to keep its highways in a reasonably safe condition for ordinary travel only, not so that it may insure protection against its use in an extraordinary or unusual manner. * * * While the stringers had decayed somewhat, and some of the planks had warped, owing to the action of the elements, yet one could safely drive or ride over it with any of the carriages and wagons in common use when driven at an ordinary speed, and in the ordinary manner. * * * Nor is it necessary in order that the bridge may be in a reasonably safe condition that the stringers be perfectly sound, or that the planking be nailed fast to the stringers. These are mere details of construction."

Dignan v. Spokane County (Wash.), 86 Pac. 649, citing with approval and following the case of Teater v. City of Seattle, 10 Wash. 327, 38 Pac. 1006.

In a number of cases, where the railing has been broken in collision with a horse or automobile, it has been held that even if the railing was insufficient or defective, this was not the proximate cause of the accident.

Plaintiff was driving a horse across a bridge over a railroad, when the horse suddenly fell against the railing, broke it down, and plaintiff was injured. It was contended that the defendant was negligent in not providing the bridge with sufficient railings, while the defendant contended that it was without fault, and that the alleged defects in the railing were not the proximate cause of the accident. The court directed a verdict in favor of the defendant. In affirming the action of the lower court, the Supreme Court said:

> "To entitle plaintiff to recover it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge. West v. Ward, 77 Iowa 324, 42 N. W. Rep. 309, and cases therein cited. Under the evidence submitted we do not think that is a matter about which there can be any controversy. The horse which Miller was driving fell because it was diseased, or not properly harnessed and driven. The width of the bridge and the condition of the railing had nothing to do with its fall and death. Had it not fallen, the accident would not have occurred. The railing of the bridge was about 2½ feet high, and it may be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided. But defendant was not an insurer against accidents. 2 Dill. Mun. Corp., section 789; Raymond v. City of Lowell, 6 Cush. 524. It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended. It was its duty to provide railings of sufficient height and strength to prevent horses and other animals from walking off at the side, and to resist any weight and pressure which would be applied under ordinary circumstances; but it was not its duty to provide a railing which would successfully resist the weight of a horse of ordinary size precipitated suddenly against it. * * * We conclude that the condition of the railing and the narrowness of the bridge were not the proximate cause of the injuries sustained by plaintiff."

McClain v. Garden Grove, *supra.*

In Mason v. County of Spartanburg, 40 S. C. 390, plaintiff alleged that his horse, becoming frightened at a hole in the highway, threw him off a bridge and down an embankment by reason of want of repair and improper construction of the bridge and its abutments. According to plaintiff's testimony, while attempting to cross a bridge over a creek in a buggy with his wife, the horse, as he put his fore-feet on the bridge, became frightened by a large hole under the bridge, and backing, threw the buggy with its occupants over the edge of the causeway, the ap-

proach to the bridge and the timbers that formed the edge of the causeway, being rotten, gave way, and these timbers, together with the rocks that had been thereby held in place, rolled down upon plaintiff, broke his leg, and otherwise injured him.

The plaintiff was nonsuited in the lower court, and on appeal to the Supreme Court this judgment was affirmed on the ground that from the evidence it appeared that the injury was due not to the defect in the bridge but to the fright of the horse.

Where a team of horses from some unknown cause became frightened and ran away, going over an embankment at the terminus of the street where there were no barriers, it was held that although it might be negligence not to have the barriers, yet such negligence was not the proximate cause of the accident, the court saying:

> "Mere concurrence of one's negligence with the proximate and efficient cause of the disaster will not create liability. But for the escape of the horses from the control of the party in charge the accident would not have happened. For that escape defendants of course were not liable."

Thubron v. Dravo Contracting Co. (Pa.), 86 Atl. 292.

Plaintiff's horse, becoming frightened by a piece of timber lying near the bridge for the purpose of repair, backed the plaintiff off the bridge, injuring her. In sustaining the lower court in granting a nonsuit, the Supreme Court held that there was no material evidence that the absence of the bannister or railing was the proximate cause of the injuries. Brown v. Laurens County, 38 S. C. 282.

It is not always considered necessary to have a railing of any kind. A case illustrative of this is Teater v. City of Seattle (Wash.), 38 Pac. 1006. This was an action for damages to a team which ran away and ran off a bridge upon which there was no railing. The basis of the action was that the city was negligent in failing to have a railing on the bridge. It appeared from the evidence that the team was under such headway that they could not make the turn to go over the bridge. From an order of nonsuit, appeal was taken to the Supreme Court of the State. In sustaining the nonsuit, the court said:

> "It further fairly appears by the plaintiff's case that the bridge, at the point in question, was in a reasonably safe condition, and that the accident was due to the fact that the horses were unmanageable, and were under a full run at the time of the accident. The absence of a guard rail does not necessarily infer negligence in all cases, and there is scarcely a possibility that a guard rail would have prevented the injury in this instance. Under these facts we think the nonsuit was properly granted. The city is not an insurer of the safety of its streets, but is only required to keep them in a safe condition for ordinary travel."

So, also, is Leber v. King County (Wash.), 124 Pac. 398. This was a suit to recover damages for personal injuries received when plaintiff's team fell down a steep precipice adjacent to the roadway. The only negligence relied upon was a failure of the county to maintain a railing or barrier on the side of the road next to the declivity. Upon demurrer the suit was dismissed. On appeal to the Supreme Court the judgment was affirmed. The court held that the duty to erect barriers was not an absolute one, and that the law did not require it unless the danger was unusual. In its opinion the court uses the following language:

> "Here we have a road graded and in repair, 15 feet wide, which is wide enough for all ordinary travel, unless it be in the populous centers of the State. We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the State. The same hazard may be encountered a thousand times in every county of the State. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads, and tend to the financial ruin of

> the counties undertaking to maintain the old ones. The unusual danger noticed by the books is a danger in the highway itself."

See to same effect, Auberle v. City of McKeesport (Pa.), 36 Atl. 212.

It has been held in one case that the driver of the car was guilty of contributory negligence preventing a recovery.

> "The guard rail gave notice to the driver of the automobile that the place was dangerous, and with this notice before him, it was his duty to avoid that danger by driving his car upon the roadway proper, and not take the chances of a test of strength between a rapidly speeding automobile and a lightly constructed guard rail, sufficient to guard against accidents resulting from the ordinary uses of the highway, but insufficient to stand such a test of strength. In this view of the case we are also of opinion that the driver of the car was clearly guilty of contributory negligence."

Wasser v. Northampton County (Pa.), 94 Atl. 444.

H. O'B. C.

March 12, 1918

CARRIERS—DELIVERY—GOODS CLAIMED BY STRANGER.—Two horses were shipped by Moses Goldberg to himself. Upon arrival at destination the plaintiff, a stranger, claimed the horses and demanded delivery. The consignee also demanded delivery. The railroad company refused to deliver the horses to either until it could investigate their claims, whereupon the consignee removed them from the car without permission from the railroad company and the plaintiff filed his action to replevy the animals. HELD, that the carrier was entitled to reasonable time for investigation of the claims of ownership, and that as to plaintiff it occupied the relation of a warehouseman only, and could make a good defense by showing that through no fault or negligence on its part it was unable to produce the property. Taylor v. Duluth, S. S. & A. Ry. Co. (Minn.), 166 N. W. 128.

TARIFFS--OVERCHARGE—JURISDICTION—INTERPRETATION—"INTERMEDIATE."—The District courts of the United States have concurrent jurisdiction with the Interstate Commerce Commission of an action for overcharge where the case involves only the proper interpretation of the tariff and not the reasonableness thereof.

The case involved shipments of grain, Newark, S. D., to Duluth, Minn. Newark is a station on a branch line of defendant's road. This branch line leaves the main line at Andover, S. D., and runs north to Cogswell, N. D. The first station north of Newark was Brampton. The tariff carried specific rates on grain from Cogswell, Brampton and Newark, to Duluth, the Newark rates being higher than the rates from Cogswell and Brampton. The tariff provided:

"Between stations on the C. M. & St. P. Ry. rates to or from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named."

The plaintiff contended that the word "intermediate" in this rule applied meant intermediate between the extreme limits of the defendant's road and that it was therefore entitled to the low rates from Cogswell and Brampton on its shipments from Newark. The Court held that "intermediate" in the rule meant points intermediate to named points and the rule had no application to a point like Newark from which a rate was specifically provided in the tariff. National Elevator Co. v. Chicago, M. & St. P. Ry. Co. (Minn.), 246 Fed. 588.

CARRIERS—STRAIGHT BILL OF LADING DELIVERY.—A shipment was made under a straight bill of lading from New York to New Orleans. The bill of lading contained the notation "sight draft against B/L." The carrier delivered the goods to the consignee in the bill of lading without requiring surrender of the bill of lading. HELD that the carrier was not liable, since its obligation under a straight bill of lading is completed by delivery to the named consignee, and such obligation was held not to be increased by the notation on the bill of lading. Dusal Chemical Co. v. Southern Pac. Co., 168 N. Y. Supp. 617.

ADMINISTRATION OF THE LAW IN TIME OF WAR.

In Pennsylvania R. Co. v. United States (C. C. A., 3d Ct., December 19, 1917), 246 Fed. 881, a case involving the question of whether the Pennsylvania Railroad had been guilty of a violation of the act of Congress known as the Hours of Service Act in requiring or permitting certain employees serving as engineers and firemen to serve on extra engines in "pusher" service for more than 16 hours in the aggregate, where the service had been interspersed with intervals during which these employees were at leisure subject to be called, Circuit Judge Buffington, for the court, took occasion in the opinion to comment upon the administration of the law in times of war in the following interesting way:

> "And we take this opportunity to say, in these war times, that while it is then, and indeed at all times, the duty of courts to see to it that laws are neither violated nor relaxed, it is also their like part to see to it that in war times the courts of a country, in their administration of law, recognize the new and unusual conditions which confront them. For if the administration of the law was so rigid and inflexible as to be self-incapable of adjusting itself to the new conditions governing that to which it relates, then much of what is wrongly charged against the law would be justified. It is now quite apparent that a large number of cases will arise under war conditions which never arose under peace conditions, and which were not and could not have been in view when statutes affecting transportation were passed. These questions, dormant in times of peace, become vitally acute under stress of war conditions, and no court can close its eyes to these new conditions. It therefore becomes the imperative price of successful practical railroad operation that governmental administrative officers, railroad executives, and railroad employes unite in a practical operation of both railroads and laws, so that the railroads may be operated to their full limit of ability. Moved by this practical, efficient, and patriotic spirit, they can thus fairly meet and promptly solve each particular case as it arises, and can accomplish far more than the courts can do, which in applying a rigid rule of law to one case and one instance may unconsciously work injury in many other instances arising out of the great complexity and new conditions arising under war transportation conditions.
>
> "Take this case as an example. It involves the very important operative work of getting freight trains over heavy grades by the help of auxiliary engines, a service so vital that the delay of such trains may seriously impede the real efficiency of a whole railroad system, since no continuous and interrelated movement of freight can be more effective than it is at its weakest point. Confronted by this difficulty, the railroad has attempted to meet it by means of rest houses, rest hours, and by relieving the men during such time from any work and from responsibility for the trains. In that regard, as the court below has found, the railroad acted in entire good faith, and there was no complaint by the engine pusher men, or any evidence that they were in any way overstrained. The case is one of those border line and exceptional ones, in which judges, jurors, executives of railroads, and interstate commerce officials might reasonably differ as to whether the law has been violated. Yet this question the railroad is compelled to settle for itself, and this at the risk of the imposition of heavy penalties. The multiplicity of these prosecutions for violation of this and similar statutes, the money spent and the time used by judges, district attorneys, court officers, and interstate commerce officials, and the frequent inability of courts to render any real help on the determination of such purely administrative questions, suggest the advisability of some change of method. Now, as we have said, the application of this and like statutes to railroad working conditions is obviously a practical railroad operative question. In the final analysis, the government, working through the agency of the Interstate Commerce Commission, is itself the responsible administrator. The law here involved provides that 'it shall be the duty of the Interstate Commerce

Commission to execute and enforce the provisions of this statute and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act,' so that control of the executive branch of the railroads is supervised by the Interstate Commerce Commission. Under the present practice, as it comes to the courts, alleged violations of these laws are reported by the inspectors, and prosecutions are instituted in court for the collection of penalties.

"It goes without saying that such a system is capable of improvement, and that, with the full and plenary power vested in the Interstate Commerce Commission, it would seem it could be practically worked out to much better advantage for the traveling public and the employe engaged in that service, if, instead of criminal prosecutions for penalties, there was substituted the supervisory power of some one authoritatively representing the Interstate Commerce Commission, who could co-operate with the executives of the railroads, who are charged with the public duty of operating roads, and thereby the close, difficult, and border line questions, which are really the principal ones now involved in such cases, could be promptly and effectively settled without resort to courts. For example, in this case, if the railroad officials, as found by the court, were acting in entire good faith, and some official of the Interstate Commerce Commission, with supervisory power and wise discretion, joined in solving this administrative question, it would seem to us it would have been better settled than by a resort to the criminal side of the federal court."

LIABILITY OF CONSIGNOR FOR FREIGHT CHARGES.—Bricks were ordered by Bailey-Marsh Company from Paine & Nixon Company, who had the bricks shipped by the defendant to the Bailey-Marsh Company, the shipment being in defendant's name and the carrier not being notified that it was acting as agent for Paine & Nixon Company. The bricks were at first rejected by the consignee on account of not being as ordered, but an arrangement was made between the consignee, Paine & Nixon Company, and the defendant that the consignee should accept the bricks and pay the freight charges. Paine & Nixon Company also undertook to see that the railroad company received its charges and gave a promissory note to the railroad company for amount of the charges, which was renewed upon maturity.

HELD, that the shipper was liable for the charges, notwithstanding a provision in the bill of lading to the effect that the owner or consignee should pay the freight charges. Neither the delivery of the shipment upon consignee's agreement to pay the charges, nor the acceptance of the note from Paine & Nixon Company, had the effect of discharging the consignor. Great Northern R. Co. v. Hocking Valley Fire Clay Co. (Wis.), 166 N. W. 41.

SALES—TELEGRAPHIC ERROR—ORDER NOTIFY SHIPMENT—REPLEVIN.—The seller telegraphed the buyer:

> "Can furnish one car clean white potatoes at one thirty-five per hundred f. o. b. Powell" (shipping point).

The message was garbled in transmission and as delivered to the buyer read:

> "Can furnish one car clean white potatoes at *once* thirty-five per hundred f. o. b. Powell."

The buyer replied:

> "Wire just received. We accept car. Ship quick as possible."

The seller shipped the potatoes to his own order, notify the buyer, and sent a draft, attached to the bill of lading, for the purchase price at $1.35 per hundred, to a bank at destination for collection. The buyer refused to pay the face amount of the draft, but tendered to the bank holding it and to the carrier the amount due at 35 cents per hundred. Being unable to get possession of the potatoes after making this tender, the seller brought an action of replevin to get possession. Held that he is entitled to judgment for possession of the potatoes. The court took the view that the telegraph company was the agent of the seller who was therefore bound by the message as delivered by the telegraph company, and that as the contract was f. o. b. car at shipping point, title passed to the consignee as soon as delivery was made to the carrier, or certainly when tender of the contract price was made by the consignee. Price Brokerage Co. v. Chicago, B. & Q. R. Co. et al. (Kan. City (Mo.), Ct. of App.), 199 S. W. 732; 86 Cent. Law Journal 141.

INTERSTATE COMMERCE COMMISSION DECISIONS.

No Jurisdiction Over Proposed Steamship Lines.

On June 14, 1915, the Charleston & Norfolk Steamship Company, a corporation chartered under the laws of South Carolina for the stated purpose of common carriage of freight by steamship, with termini at Charleston, S. C., Norfolk, Va., and Baltimore, Md., filed a complaint with the Commission wherein it prayed, in substance, that the Commission enter an order under the provisions of paragraph (c) of section 6 of the act as amended by the Panama Canal act of August 24, 1912, requiring the defendant railroads to establish and maintain proportional rates not exceeding certain specified amounts on freight traffic from Louisville, Ky., Cincinnati and Portsmouth, Ohio, and other points, to Norfolk, destined to Charleston, in connection with a boat line to be operated by complainant, and all other boat lines which might operate between the same points. The Commission dismissed the complaint for want of jurisdiction. Charleston & Norfolk S. S. Co. v. C. & O. Ry. Co., 40 I. C. C. 382. The proceeding was reopened for further consideration and consolidated with a proceeding instituted by the Commission on its own motion, in pursuance to Senate resolution 249, 64th Congress. The Commission again held that the Charleston & Norfolk S. S. Co. was not a common carrier within the meaning of the Panama Canal act, and dismissed the complaint and discontinued their investigation. Charleston & Norfolk S. S. Co., 47 I. C. C. 365.

Car Distribution Rules Not Unreasonable.

Complainant purchased coal of a coal-mining company to be delivered to complainant at a siding at the company's mines at Figart, Pa. The defendant refused to furnish cars for the interstate transportation of the coal, except upon condition that the cars so furnished should be counted against the allotment of cars to the mining company as determined by the rating of its mine and the defendant's rules of car distribution. Upon complaint alleging that the defendant's refusal to furnish cars as requested was unreasonable, unjustly discriminatory, and unduly prejudicial, the Commission HELD, That the proper observance and impartial application of defendant's rules for the distribution of coal cars required it to pursue the course adopted, and its refusal to furnish cars under the circumstances disclosed upon this record was not unreasonable or otherwise unlawful. William H. Greenfield, Jr., trading as Greenfield & Co. v. P. R. R. Co., 47 I. C. C. 403.

Tuscaloosa, Ala., Not Subjected To Undue Discrimination.

The Board of Trade of Tuscaloosa filed with the Commission a complaint alleging undue prejudice and disadvantage to Tuscaloosa, Ala., in the class and commodity rate adjustment from Ohio River crossings, St. Louis, Mo., Memphis, Tenn., and other lower Mississippi River crossings and from points beyond, from Gulf, South Atlantic, and Virginia ports, from eastern cities and interior eastern points, and from Buffalo-Pittsburgh territory to Tuscaloosa, Birmingham, Montgomery, and Selma, Ala. The petition prayed for the establishment of joint through rates from Cleveland-Detroit territory in lieu of existing combinations on the Ohio River, and for the establishment of through routes and joint rates from eastern port cities and interior eastern points, Norfolk, Va., and South Atlantic coast points through the port of Mobile, Ala. In addition, because of changes in conditions of transportation by water since the fourth section hearings were concluded, the Commission was asked to reconsider and modify the report and order in Fourth Section Violations in the Southeast, 30 I. C. C. 153, and 32 I. C. C. 61, to authorize further departures from the long-and-short-haul rule of the fourth section in connection with rates to Tuscaloosa. An amendment to the original complaint asked the Commission to grant reparation on behalf of certain of complainant's members on all shipments made within two years prior to the filing of the complaint. The Commission HELD, That the disparities in the rates to the points named do not effect unlawful prejudice or disadvantage to Tuscaloosa and dismissed the complaint. Tuscaloosa Board of Trade v. A. G. S. R. R. Co., et al., 47 I. C. C. 483.

CONFERENCE RULING RELATIVE TO DEMURRAGE AND STORAGE ON FUELLESS DAYS.

The Commission, Division 2, in conference on February 16, 1918, considered the following inquiries concerning demurrage charges and storage charges assessed by common carriers on the fuelless days designated in the order of the Fuel Administrator, dated January 17, 1918:

> First, May the fuelless days designated by the Fuel Administrator be considered legal holidays as that term is used in the demurrage code?
>
> Second, Should demurrage charges be collected on a shipment such as asphalt which arrived at destination on January 18 and which because of its consistency could not be unloaded without first being heated and which was not heated because of the shipper's understanding of the Fuel Administrator's order?
>
> Third, Should demurrage charges be collected on cars containing freight which could not be loaded or unloaded without the use of a derrick operated by power derived from fuel?
>
> Fourth, Should demurrage charges be collected on shipments to a large industrial concern which could not load or unload them without certain inter-plant switching which could not be performed without power derived from fuel?
>
> Fifth, Should storage charges be assessed on less-than-carload freight which was not removed because an industry completely ceased operation on the fuelless days as the result of its understanding of the Fuel Administrator's order and of the instructions of the local fuel administrator?

Held, as to the first question, that the fuelless days designated by the Fuel Administrator may not be considered legal holidays as that term is used in the demurrage code.

Held, as to the second and third question, that a particular shipper's understanding of the Fuel Administrator's order is not conclusive, as different shippers may construe the order differently; and that in cases where power or heat derived from fuel is necessary and customary for loading or unloading property, cars arriving and set for loading or unloading on January 18 should be treated exactly as though set for loading or unloading on January 23. In other words, in the circumstances of these cases, no demurrage charge should be assessed.

Held, as to the fourth question, that demurrage charges should be collected on shipments to industrial concerns which failed to load or unload cars because it is alleged that they were prevented by the Fuel Administrator's order from using locomotives for interplant switching. The Commission does not consider that there was any prohibition upon the plant locomotives from using power where necessary for loading or unloading any more than there was a prohibition against the use of locomotives for general railroad business.

Held, as to the fifth question, that storage charges should be assessed on less-than-carload freight not moved because the industry ceased operation on the fuelless days as the result if its interpretation of the Fuel Administrator's order, or the instructions of the local Fuel Administrator.

DELAY TO MACHINERY—MEASURE OF DAMAGES.—A cotton gin outfit was delivered to the defendant at Gullett, La., a point in the cotton belt, during the ginning season, for shipment to plaintiff at Tumlin Gap, Ala. The gin was badly delayed in transit and this action was brought for damages. The court held that plaintiff was not entitled to recover for loss of business between the time the gin should have arrived and the time it did arrive, because such loss was special damages and the carrier was not given notice of the circumstances, and was not put on notice by reason of the nature of the shipment, season, etc. The measure of damage in a case of this sort is said to be the value of the use of the machinery during the delay—*i. e.*, its rental value. Brothers v. Ill. Cent. R. Co. (Ala. App.), 77 So. 423.

THE RAILROAD CONTROL ACT.*

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen. That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the act of October third, nineteen hundred and seventeen, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment,) shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals and betterments to such property not justly chargeable to the

*Passed by both Houses of Congress, but not signed by President at time of going to press, March 19.

United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this act or of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June 30, 1917, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this act: Provided, hower, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this act and any regulation or order made by or through the President under authority of this act or of that portion of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

Sec. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The acceptance of any benefits under this section shall constitute an acceptance by the carrier of all the provisions of this Act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

Sec. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdic-

tion of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

Sec. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

Sec. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: Provided, however, That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

Sec. 6. That the sum of $500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways, and may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agree-

ments as he shall deem in the public interest.

Sec. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this Act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

Sec. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and cooperation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

Sec. 9. That the provisions of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act; and the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this Act shall also apply to any carriers to which Federal control may be hereafter extended.

Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regula-

tions, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: Provided, however, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Sec. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper, or other person, who shall knowingly violate or fail to observe any of the provisions of this act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than $5,000, or if a person by imprisonment for not more than two years, or both. Each independent transaction constituting a violation of, or a failure to observe, any of the provisions of this act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply to all officers, agents, and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

Sec. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December 27, 1917, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct, except that taxes under Titles 1 and 2 of the act entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or any act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United Stats to the credit of the revolving fund created by this act. If such revenues are insuffi- to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

Sec. 13. That all pending cases in the courts of the United States affecting railroads

or other transportation systems brought under the act to regulate commerce, approved February 4, 1887, as amended and supplemented, including the commodities clause, so called, or under the act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890, and amendments thereto shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

Sec. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, however, That the President may, prior to July 1, 1918, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Sec. 16. That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

CIVIL ENGINEER INJURED BY STEPPING ON DEFECTIVE CROSS-TIE IN TRACK—NO NEGLIGENCE.—Plaintiff, a civil engineer of 11 years' experience in railroad work, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a cross-tie, a small V-shaped piece of it one and a half inches by six, being rotten, slivered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

The state supreme court reversed the trial court's refusal to grant a nonsuit, on the ground that there was no negligence proven. This was approved by the Supreme Court of the United States, the court saying:

> "It is clear that the defendant did not fail in any duty which it owed to the plaintiff."

Philip Nelson v. Southern Ry. Co., No. 129, October Term, 1917, U. S. Supreme Court, decided March 4, 1918.

CARRIERS OF GOODS — COMMENCEMENT OF LIABILITY—COTTON PLACED ON RAILROAD PLATFORM PREPARATORY TO SHIPPING.—The rule is laid down that the relation of shipper and carrier begins, and the carrier's liability as such, commences, when the goods have been delivered completely into the control and possession of the carrier and nothing remains to be done by the shipper. In the instant case the evidence was that the shipper hauled cotton to the railroad platform with intent to ship it when it was all hauled. The railroad agent objected to the cotton being put on the platform until the shipper was ready to take out his bill of lading and told the shipper's agent that the company would not be responsible for loss from fire or otherwise. The agent also testified, however, that it was not the custom to issue bills of lading to shippers

shipping over 40 bales of cotton until all the cotton was on the platform, and that he received the cotton as he always did with the understanding that it would be shipped when it was all hauled in. The cotton had been on the platform about eight or ten days, and no shipping orders had been given when it was damaged by fire originating from sparks from the carrier's locomotive. The trial resulted in a verdict for the carrier. Bogart v. Wade (Ark.), 200 S. W. 148.

Carriage of Perishable Fruits.—In an action against a carrier for the decay of a car of peaches shipped from Texas to Indianapolis, there was an inference of full refrigeration from payment of full charge therefor, and there was no showing that the time in transit, about 96 hours, was not reasonable dispatch. The Texas Court of Civil Appeals holds that a mere showing of delivery to the initial carrier in good condition and delivery by the terminal carrier in bad condition with testimony that the peaches should have been carried 60 to 72 hours under proper refrigeration, did not warrant a directed verdict for the plaintiff. The inferences as to the railroad's negligence or fault being conflicting and not conclusive, the case was for the jury. Judgment for the plaintiff was therefore reversed. Texas & P. R. Co. v. Woldert Grocery Co. (Tex.), 199 S. W. 1139. Re-hearing denied.

Carriage of Passengers—Injury To Passenger's Hand By Door Jamb.—In an action for personal injuries to a passenger it appeared that the plaintiff boarded the train at Atlantic, and at South Boston, where the train stopped, when about to alight, her left hand was caught in the jamb of the forward door of the car. At this station the track is straight, the grade as estimated by an engineer called by the plaintiff, was about 2½ or 3 per cent down grade. The car was crowded and people were standing in the aisle near the forward door. She followed the passengers leaving the car and stopped on the car platform for a moment to allow some people to precede her. As she was going onto the car platform she saw the brakeman approaching through the aisle of the car ahead and heard him shout, "Look out for your hand!" but the warning was too late, and the door swung to, crushing her fingers. There was evidence that as each passenger went out they held the door. There was nothing to show that there was a catch to hold the door in place when open, and there was no evidence of any defect in the door or its appliances. Nothing appeared to show by whom or at what time the door was opened. The Massachusetts Supreme Judicial Court considered this the difficulty with the plaintiff's case. It distinguished, as inapplicable here, the cases of Kellogg v. Boston & M. R. Co., 210 Mass. 324, 96 N. E. 525, and Silva v. Boston & M. R. Co., 204 Mass. 63, 90 N. E. 547, where the car door was opened by employees of the railroad. It was held that a grade of 2½ or 3 per cent did not show negligence, nor did the fact require the presence of a brakeman at the door of each car where passengers were alighting, and his absence from the platform was not negligence. Exceptions to a verdict for the railroad were overruled. MacGillAllen v. New York, N. H. & H. R. Co. (Mass.), 118 N. W. 248.

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THE MEMORANDUM

Vol. III No. 9

LAW DEPARTMENT APRIL, 1918. SOUTHERN RAILWAY COMPANY

EDITORIAL NOTE.—For the information and convenience of counsel and others interested, this issue of THE MEMORANDUM is chiefly devoted to the Proclamation of the President taking possession and control of the railroads, and to the General Orders of the Director General of Railroads issued under authority of that Proclamation and of the Act of Congress of March 21, 1918. General Orders 1 to 18, inclusive, are published herein. Later orders will appear in subsequent issues.

POSSESSION AND CONTROL OF RAIL AND WATER TRANSPORTATION SYSTEMS.

By the President of the United States of America.

A PROCLAMATION.

WHEREAS the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date April 6, 1917, resolved:

> That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

And by joint resolution bearing date of December 7, 1917, resolved:

> That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States.

And whereas it is provided by section 1 of the Act approved August 29, 1916, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," as follows:

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion as far as may be necessary of other than war traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war;

NOW, THEREFORE, I, WOODROW WILSON,

President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation;—to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the Boards of Directors, Receivers, officers and employees of said systems of transportation. Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the Boards of Directors, Receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such.

Nothing herein shall be construed as now affecting the possession, operation and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control or operation may be taken of all or any part of such street railway systems, including subways and tunnels, and by subsequent order and proclamation possession, control and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession and control of which are hereby assumed.

The Director shall as soon as may be after having assumed such possession and control enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation, above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three year period ending June 30, 1917,—the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors and other persons having interests in said systems of transportation or in the profits thereof, to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

Regular dividends hitherto declared, and maturing interest upon bonds, debentures and other obligations, may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said Director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the Director, the various carriers may agree upon and arrange for

the renewal and extension of maturing obligations.

Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine.

From and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice. But for the purpose of accounting said possession and control shall date from twelve o'clock midnight on December 31, 1917.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our [SEAL.] Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second.

WOODROW WILSON.

By the President:

ROBERT LANSING, *Secretary of State.*
NEWTON D. BAKER, *Secretary of War.*

[No. 1419.]

GENERAL ORDERS OF THE DIRECTOR GENERAL.

December 29, 1917.

ORDER No. 1.

Pursuant to the order of the President of the United States, through the Secretary of War, the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the Proclamation of the President, of which Proclamation and Order officers, agents and employees of said transportation systems are to take immediate and careful notice. In addition to the provisions therein contained, it is,

UNTIL FURTHER ORDER, DIRECTED THAT:

1. All officers, agents and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

2. Any officer, agent or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

3. All transportation systems covered by said Proclamation and Order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

6. Through routes which have not heretofore been established because of short hauling or other causes, are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing, notice thereof shall by carriers or shippers or both be given at once to the Director by wire.

7. Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said Proclamation or with this order shall be brought immediately by wire to the attention of the Director.

December 29, 1917.

GENERAL ORDER No. 2.

TO THE CHIEF EXECUTIVES OF THE RAILROADS

Pursuant to the authority vested in me by

the President of the United States in his proclamation of December 26, 1917, wherein it was stated that for purposes of accounting, possession and control of the railroads shall date from 12 o'clock midnight on December 31, 1917, you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control.

General Order No. 3 canceled by General Order No. 7.

January 18, 1918.

GENERAL ORDER No. 4.

For purposes of operation the railroads of the United States will be classified as Eastern Railroads, Southern Railroads and Western Railroads, defined as follows:

EASTERN RAILROADS—The railroads in that portion of the United States north of the Ohio and Potomac Rivers and east of Lake Michigan and the Indiana-Illinois State line; also those railroads in Illinois extending into that State from points east of the Indiana-Illinois State line; also the Chesapeake & Ohio, the Norfolk & Western and the Virginian railways.

SOUTHERN RAILROADS—All railroads in that portion of the United States south of the Ohio and Potomac Rivers and east of the Mississippi River, except the Chesapeake & Ohio, Norfolk & Western and the Virginian railways; and also those railroads in Illinois and Indiana extending into those states from points south of the Ohio River.

WESTERN RAILROADS—All railroads not included in the above definition and, broadly speaking, all railroads in the territory west of Lake Michigan and of the Indiana-Illinois State line to the Ohio River and west of the Mississippi River from the Ohio River to the Gulf of Mexico, excepting those railroads in Illinois included in Eastern territory, and those railroads in Illinois and Indiana included in Southern territory, as above stated.

Mr. A. H. Smith, president of the New York Central, is appointed Regional Director, with office at New York, in charge of the operation of Eastern Railroads.

Mr. C. H. Markham, president of the Illinois Central, is appointed Regional Director, with office at Atlanta, in charge of the operation of Southern Railroads.

Mr. R. H. Aishton, president of the Chicago & North Western, is appointed Regional Director, with office at Chicago, in charge of the operation of Western Railroads.

Orders issued by the gentlemen named in their capacity as Regional Directors will be issued by authority of the Director General, and will be respected accordingly.

January 18, 1918.

GENERAL ORDER No. 5.

Pursuant to the authority vested in me as Director General of Railroads by the President of the United States in his proclamation of December 26, 1917, I hereby create a Railroad Wage Commission and name as the members thereof Franklin K. Lane, Secretary of the Interior; Charles C. McChord, member of the Interstate Commerce Commission; J. Harry Covington, Chief Justice of the Supreme Court of the District of Columbia, and William R. Willcox of New York.

IT IS ORDERED AND DIRECTED THAT:

The Commission shall make a general investigation of the compensation of persons in the railroad service, the relation of railroad wages to wages in other industries, the conditions respecting wages in different parts of the country, the special emergency respecting wages which exists at this time owing to war conditions and the high cost of living, as well as the relation between different classes of railroad labor.

The Commission shall begin its labors at once and make report to the Director General, giving its recommendations in general terms as to changes in existing compensations that should be made.

Officers, agents and employees of the railroads are directed to furnish to the Railroad Wage Commission, upon request, all information it may require in the course of its investigations.

January 28, 1918.

General Order No. 6.

To Officers and Directors of Railroad Companies.

During the period of possession, operation and Government control of railroads, it is necessary that officers, directors and agents of railroad companies be very careful in the handling of moneys and in the dealing with transportation matters. Without attempting at this time to give general directions, there are a few matters involving the expenditure of moneys for purposes having no direct relation to transportation, which should receive immediate attention, as well as the issuance of free transportation.

It is therefore ordered that the carriers' operating revenues shall not be expended:

1. For the payment of agents or other persons who are employed in any way to affect legislation.
2. For the employment of attorneys who are not actually engaged in the performance of necessary legal work for the company.
3. For the payment of the expenses of persons or agencies constituting associations of carriers unless such association is approved in advance by the Director General.
4. For any political purpose or to directly or indirectly influence the election of any person or an election affecting any public measure.

Issuance of Free Passes.

No passes or free transportation shall be issued by any carrier under Federal control or any official of such carrier unless the issuance of such free transportation is expressly authorized by the Act of Congress, entitled "An Act to Regulate Commerce, Approved February 4, 1887, and Amendments thereto," and any such passes or free transportation heretofore issued not in conformity with said act must be recalled.

This order applies to all carriers under Federal control, whether inter-state or intra-state.

March 26, 1918.

Supplement to General Order No. 6.

On the 28th day of January, 1918, General Order No. 6 was issued prohibiting the issuance of free transportation except as expressly authorized by the Act of Congress, approved February 4, 1887, and amendments thereto.

The carriers, in obedience to said order, withdrew the passes or mileage books which had theretofore been issued pursuant to contracts for newspaper advertising, the issuance thereof interstate having been held unlawful by the Supreme Court of the United States (219 U. S., 486).

It later came to my attention that contracts for newspaper advertising to be paid for in transportation at a fixed rate had been made in various sections of the country; that mileage books had been issued pursuant to such contracts, and that the war tax thereon had been paid as required by law. It seemed to me important, therefore, that the legality of such contracts should be passed upon by the Interstate Commerce Commission. Accordingly, this and a number of other questions growing out of General Order No. 6 was referred by me to the Interstate Commerce Commission for consideration.

I am in receipt of its report dealing only with this question, in which it is said:

"In view of the circumstances * * * we are inclined to suggest the advisability of modification of the Director General's Order No. 6 to the extent of permitting a continuance of contracts already made for the exchange of intrastate passenger transportation for advertising to the termination of such contracts, but in no instance beyond the end of the current calendar year. We recommend such modification of the order, but suggest that in connection therewith it be made entirely clear that it applies only to contracts now in effect, and which are not repugnant to state requirements; that it authorizes only completion of such contracts which expire prior to the end of the present calendar year, and a continuance only to the end of the year of any which may by their terms terminate at a later date. It should also, we think, be made clear that transportation issued under such contract may not be used in connection with other transportation on any interstate journey."

It is therefore ordered that the said General Order No. 6 be and the same is modified accordingly, and the carriers will be permitted to recognize the validity of said contracts and honor transportation to the extent recommended by said Commission.

January 29, 1918.

ORDER No. 7.

All carriers by railroads, subject to the jurisdiction of the undersigned, are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs in the form shown in the attached appendix, effective February 10, 1918, wherein demurrage rules, regulations and charges shall be changed so as to provide:

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. That the average agreement rule be permitted, but that it apply solely to cars held for unloading.

C. That under the average rule the number of days on which debits accrue be made four instead of five.

D. That the demurrage charge on all cars, after the expiration of the free time allowed, be $3 for each of the first four days, $6 for each of the next three days and $10 for each succeeding day.

E. That the bunching rule be reinstated with the following change in paragraph 2:

Cars for unloading or reconsigning.—When, as the result of the act or neglect of any carrier, cars originating at the same point or at intermediate points moving via the same route and destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the carrier in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to carriers' agent within fifteen (15) days.

These charges will supersede all those named in any existing tariffs applicable to carload freight except:

1. Cars loaded with live stock.

2. Empty cars placed for loading coal at mines or mine sidings or coke at coke ovens and cars under load at mines or mine sidings or coke at coke ovens.

3. Foreign export freight awaiting ships at ports.

4. Coal for transshipment at tidewater or lake ports.

5. Empty private cars stored on railroad or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

and specifically contemplate the cancellation of all conflicting provisions of existing tariffs.

Upon my request the Interstate Commerce Commission has issued Fifteenth Section Order No. 300, authorizing the filing of tariffs to accord with the appendix hereto and to become effective February 10, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Order No. 3 is hereby withdrawn and canceled.

February 21, 1918.

ORDER No. 8.

To correct wrong impressions that may exist regarding the employment and conditions of labor in railway service, it is

UNTIL FURTHER ORDER DIRECTED THAT:

1. All Acts of Congress to promote the safety of employees and travelers upon the railroads, including acts requiring investigation of accidents on railroads and orders of the Interstate Commerce Commission made in accordance therewith, must be fully complied with. These acts and orders refer to hours of service, safety appliances and inspection.

Now that the railroads are in the possession and control of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government; therefore it will become the duty of the Director General, in the enforcement of said laws and orders, to impose punishments for willful and inexcusable violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case.

2. When the exigencies of the service require it, or when a sufficient number of employees in any department are not available to render the public prompt transportation service, employees will be required to work a reasonable amount of overtime. So far as efficient and economic operation will permit,

excessive hours of employment will not be required of employees.

3. The broad question of wages and hours will be passed upon and reported to the Director General as promptly as possible by the present Railroad Wage Commission. Pending a disposition of these matters by the Director General all requests of employees involving revisions of schedules or general changes in conditions affecting wages and hours will be held in abeyance by both the managers and employees. Wages, when determined upon, will be made retroactive to January 1, 1918, and adjusted accordingly. Matters of controversy arising under interpretations of existing wage agreements and other matters not relating to wages and hours will take their usual course, and in the event of inability to reach a settlement will be referred to the Director General.

4. In Order No. 1, issued December 29, 1917, the following appeared:

"All officers, agents and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment."

The impression seems to exist on some railroads that the said order was intended to prevent any change in the terms of employment during Governmental operation. The purpose of the order was to confirm all terms of employment existing upon that date, but subject to subsequent modifications deemed advisable for the requirements of the service. Any contrary impression or construction is erroneous. Officers and employees will be governed by the construction here given.

5. No discrimination will be made in the employment, retention or conditions of employment of employees because of membership or nonmembership in labor organizations.

The Government now being in control of the railroads, the officers and employees of the various companies no longer serve a private interest. All now serve the Government and public interest only. I want the officers and employees to get the spirit of the new era. Supreme devotion to country, an invincible determination to perform the imperative duties of the hour while the life of the nation is imperilled by war must obliterate old enmities and make friends and comrades of us all. There must be co-operation, not antagonism; confidence, not suspicion; mutual helpfulness, not grudging performance; just consideration, not arbitrary disregard of each other's rights and feelings; a fine discipline based on mutual respect and sympathy, and an earnest desire to serve the great public faithfully and efficiently. This is the new spirit and purpose that must pervade every part and branch of the national railroad service.

America's safety, America's ideals, America's rights are at stake. Democracy and liberty throughout the world depend upon America's valor, America's strength, America's fighting power. We can win and save the world from despotism and bondage only if we pull together. We canont pull apart without ditching the train. Let us go forward with unshakable purpose to do our part superlatively. Then we shall save America, restore peace to a distracted world, and gain for ourselves the coveted distinction and just reward of patriotic service nobly done.

February 23, 1918.

GENERAL ORDER NO. 9.

With reference to officers whose salaries are chargeable to operating expenses, it is hereby ordered:

1. A carrier shall not create an additional office or fill a vacancy in an existing office except when such step is necessary to the operation of the railroad under the existing condition of Government possession and control. In cases of doubt, application, with statement of salary proposed, may be made through the Regional Director for the Director General's approval.

2. A carrier shall not fill a vacancy in an office of or above the grade of General Manager or create such an office without the approval of the Director General. Application, with statement of salary proposed, may be made through the Regional Director for the Director General's approval.

3. With reference to general officers and division officers (according to I. C. C. classification of steam railway employees), receiving $3,000 or more and less than $10,000 per year, each carrier shall make to the Regional Director a monthly report showing increases in salaries, appointments (showing salaries therefor) to fill vacancies, and the creation of new positions (showing salaries therefor), beginning with the month of January, 1918.

4. With reference to such general officers and division officers receiving $10,000 or more per year, such monthly report shall be made in duplicate, and one duplicate shall be

sent to the Regional Director and the other duplicate to the Director General.

March 14, 1918.

GENERAL ORDER No. 10.

Each and every carrier subject to Federal control shall, prior to May 1, 1918, commence taking an inventory of its materials and supplies by actual count, measurement, weight, etc., and shall immediately upon completion thereof adjust such inventory, by additions and deductions, to December 31, 1917; provided, however, that any such carrier that has taken an inventory of its materials and supplies in the form indicated within 90 days prior to December 31, 1917, or subsequent to the latter date, shall not be required to take an additional inventory, but shall adjust the inventory previously taken, by additions and deductions, to December 31, 1917.

The said inventory shall be preserved in the files of the carrier.

March 16, 1918.

GENERAL ORDER No. 11.

FOR THE ADOPTION OF UNIVERSAL INTERLINE WAYBILLING AND STANDARD FORMS.

To Chief Executive Officers of Carriers Subject to Federal Control:

1. Effective May 1, 1918, all freight forwarded from one point in the United States to another point in the United States (including freight passing through Canada or Mexico en route), and moving over two or more railroads or boat lines under Federal control, must be waybilled through from point of origin to destination, regardless of the absence of joint rates. When destination station is on a railroad not under Federal control, freight should be waybilled to the junction point with such road; provided, however, that nothing in this paragraph shall prohibit through waybilling arrangements between carriers now under Federal control and others not so controlled.

2. A separate waybill must be made for each less carload consignment and for each carload; provided, however, that a single waybill may be made to cover a special train moving at a lump sum charge for the train or for shipments which, on account of their length, require more than one car.

3. Waybills for carload freight must move with the cars. Waybills for less carload freight must be moved with the cars when practicable; otherwise so as to reach the transfer point or destination station with or in advance of the cars. In the event that waybills for solid cars of less carload freight are mailed direct to destination or transfer stations, a separate waybill must be made on standard form, showing destination of car, and bearing notation:

Merchandise car, waybills mailed to .....

Junction agents must show stamps on this waybill in the same manner as provided in Paragraph 4.

4. Complete routing must be specified on each waybill as and when made, in the space provided therefor. Each forwarding junction agent, at points of interchange, must stamp each waybill for freights interchanged in the space at the bottom of the waybill and in the order there shown. Such stamps must show the station at which the interchange is made and the name of the railroad forwarding the freight from such junction, for example:

Jamestown
North & South R. R.

(Stamp must be 1½ inches by ⅜ inch.)

5. When freight moves on a joint through rate, each waybill must show freight charges from point of origin to destination.

6. Freight moving on a combination of rates:

(a) If the billing agent is in possession of all necessary tariffs, the rate and freight charges to and beyond the rate breaking points must be shown successively, one beneath the other, and the total of all freight charges indicated. For example, the rate and freight charges on a shipment from New York, N. Y., to Denver, Colorado, will appear as follows:

	Weight	Rate	Freight
To Miss. River.....	200	$1.055	$2.11
Miss. River to Denver..		1.62	3.24
Total			$5.35

(b) If the billing agent is not in possession of the rates beyond the rate breaking point, the waybill must be headed to destination, and the rate and freight charges shown to the rate breaking point, with the movement beyond indicated. For example:

	Weight	Rate	Freight
To Miss. River.....	200	$1.055	$2.11
Miss. River to Denver..			

In this case the billing agent will stamp or endorse waybill as follows:

"Shipment not rated through.
Junction or destination agent
will insert charges omitted."

(Stamp, if used, must be 1½ inches by ⅜ inch.)

(c) The junction receiving agent must revise rates on inbound billing to the rate breaking point, insert the divisions of revenue accruing to the roads up to the rate breaking point, and certify to their correctness, by use of an appropriate rubber stamp reading as follows:

Revised at.....
North & South R. R.

(Stamp used must be 1½ inches by ⅜ inch.)

(d) Agents forwarding shipments from rate breaking points must insert rates and freight charges applicable to destination or to the next rate breaking point. If in any case this plan is not practicable, arrangements may be made to have such rates and charges inserted by destination agents.

7. When miscellaneous charges of any character accrue in transit, and they are to be collected from consignee, they should be shown as separate items in the freight charges column on waybills, with notation opposite each item indicating the nature of the charge, the point at which it accrued, and the road to which due. In final settlement, such charges will be allowed as an arbitrary to carrier to which they are due.

8. A standard form of waybill (sample attached) is hereby prescribed, and must be used on and after May 1, 1918.

(a) This waybill form must be printed on paper approximating in weight "80 pounds No. 1 Manila, 24x36."

(b) Only the original and one copy of waybill shall be made. The original must accompany the shipment as herein provided and the copy must be retained by the company making the waybill.

(c) This waybill shall also be used for astray freight.

(d) This waybill is designed to be folded vertically, and left side containing all information for the physical movement of the car.

(e) For special classes of traffic, requiring a larger waybill, the form may be 8½ by 22 inches.

(f) Supplies of waybill forms now on hand may be used for local business.

9. The Plan of Audit Office Settlement recommended by the Association of American Railway Accounting Officers, as outlined in that association's 1917 synopsis—paragraphs 16, 17, 18, 28, 29 and 30 shall govern. This plan requires that destination carriers shall make settlement with each of the carriers in interest for its proportion of revenue.

10. The total freight charges, as reported by destination carrier, and the divisions thereof, must be accepted by all interested carriers as final. No recheck of such settlement will be made, except as to advances and prepaid, and to establish lists of unreported waybills.

11. The following forms must be used in preparing Audit Office Settlement accounts:

(a) Interline abstract. Form (A. A. R. A. O.) 104.

(b) Division sheet. Form (A. A. R. A. O.) 105.

(c) Summary of interline accounts. Form (A. A. R. A. O.) 110.

These forms are recommended by the Association of American Railway Accounting Officers, and samples are shown in that association's 1917 synopsis.

12. Unless and until otherwise ordered revenues shall be apportioned among carriers in accordance with the route via which the shipment moved, in the following manner:

(a) Where joint through rates are in effect, established divisions, or any simplifications thereof which may have been perfected, shall be used.

(b) Combination rates shall be divided as made. If one or more of the factors in the combination are joint through rates, such factors shall be divided as provided in sub-paragraph (a) preceding.

(c) When neither of the above division bases can be used, revenues shall be divided on twenty-mile block mileage basis, each carrier to be allowed at least twenty miles, and originating and terminal carriers an additional twenty miles each as constructive mileage.

13. Simplified bases for apportioning interroad freight revenues are now being considered; upon their determination carriers will be advised thereof in a subsequent order.

14. Immediate steps shall be taken by each carrier to make the foregoing regulations effective as of May 1, 1918, and to procure supplies of the prescribed waybill and accounting forms, and to issue the necessary instructions to all concerned.

March 21, 1918.

GENERAL ORDER NO. 12.

It is ordered that the following rules be observed with respect to all railroad work in-

volving charges to capital account, viz:

1. In determining what additions and betterments, including equipment, and what road extensions should be treated as necessary, and what work already entered upon should be suspended, please be guided by the following general principles:

(a) From the financial standpoint it is highly important to avoid the necessity for raising any new capital which is not absolutely necessary for the protection and development of the required transportation facilities to meet the present and prospective needs of the country's business under war conditions. From the standpoint of the available supply of labor and material, it is likewise highly important that this supply shall not be absorbed except for the necessary purposes mentioned in the preceding sentence.

(b) Please also bear in mind that it may frequently happen that projects which might be regarded as highly meritorious and necessary when viewed from the separate standpoint of a particular company, may not be equally meritorious or necessary under existing conditions, when the Government has possession and control of the railroads generally, and therefore when the facilities heretofore subject to the exclusive control of the separate companies are now available for common use, whenever such common use will promote the movement of traffic.

2. The construction of new lines or branches or extensions of existing lines shall not be entered upon or contracted for without the Director General's approval.

3. No new locomotives or cars shall be ordered or constructed without the Director General's approval.

4. Work contracted for or actually commenced prior to January 1, 1918, and unfinished, may be continued until further order, except insofar as in the judgment of the carrier concerned it may be possible to discontinue or curtail it without substantial loss, in order to conform to the general principles outlined in paragraph 1 hereof.

5. Other work which does not involve charges to capital account in excess of $25,000 may be contracted for and commenced without approval of the Director General; provided, that:

(a) It conforms to the policy outlined in paragraph 1 hereof; that

(b) It also falls clearly within the policy of the particular carrier as that policy has been applied in practice during the two calendar years 1916 and 1917; and that

(c) A report giving a brief description of each project involving not less than $5,000 nor more than $25,000 chargeable to capital account and showing also the amount chargeable to operating expenses, shall be made in duplicate to the Director of the Division of Capital Expenditures at Washington and Regional Director for the district within ten days after the work shall be contracted for or commenced.

6. No work involving a charge to capital account in excess of $25,000 shall be contracted for or commenced subsequent to January 1, 1918, unless

(a) It conforms to the policy outlined in paragraph 1 hereof; and unless

(b) It be authorized by the Director General.

7. The Director of the Division of Capital Expenditures is authorized to prescribe such forms, require such reports and issue such regulations and instructions as may be necessary to carry out this order.

Washington, March 22, 1918.

GENERAL ORDER No. 13.

Whereas practically all of the railroads now under control of the Director General have in existence at this time agreements with the Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen which provide for basis of compensation and regulations of employment; and

Whereas in existing circumstances it is the patriotic duty of both officers and employees of the railroads under Federal control, during the present war, promptly and equitably to adjust any controversies which may arise, thereby eliminating misunderstandings which tend to lessen the efficiency of the service:

It is hereby ordered, That the basis arrived at in the annexed understanding between Messrs. A. H. Smith, C. H. Markham and R. H. Aishton, regional directors, representing the railroads in the eastern, southern and western territories, with the chief executive officers of the Brotherhood of Locomotive Engineers, Order of Railway Conductors,

Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen, be, and the same is hereby adopted and put into effect as of March 22, 1918.

MEMORANDUM OF AN UNDERSTANDING BETWEEN MESSRS. A. H. SMITH, C. H. MARKHAM AND R. H. AISHTON, REGIONAL DIRECTORS, REPRESENTING THE RAILROADS IN THEIR RESPECTIVE REGIONS, AND MR. W. S. STONE, GRAND CHIEF ENGINEER, BROTHERHOOD OF LOCOMOTIVE ENGINEERS; MR. A. B. GARRETSON, PRESIDENT, ORDER OF RAILWAY CONDUCTORS; MR. W. G. LEE, PRESIDENT, BROTHERHOOD OF RAILROAD TRAINMEN; MR. TIMOTHY SHEA, ACTING PRESIDENT, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

It is understood, That all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:

1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members—four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

2. This Board of Adjustment No. 1 shall meet in the city of Washington within 10 days after the selection of its members and elect a chairman and vice chairman, who shall be members of the board. The chairman or vice charman will preside at meetings of the board, and both will be required to vote upon the adoption of all decisions of the board.

3. The board shall meet regularly, at stated times each month, and continue in session until all matters before it are considered.

4. Unless otherwise mutually agreed, all meetings of the board shall be held in the city of Washington: *Provided,* That the board shall have authority to empower two or more of its members to conduct hearings and pass upon controversies, when properly submitted at any place designated by the board: *Provided further,* That such subdivision of the board will not be authorized to make final decision. All decisions shall be made and approved by the entire board, as herein provided.

5. Should a vacancy occur in the board for any cause, such vacancies shall be immediately filled by the same appointive authority which made the original selection.

6. All authority vested in the Commission of Eight, to adjust disputes arising out of the application of the eight-hour law, is hereby transferred to the Railway Board of Adjustment No. 1, in the same manner as has heretofore been done by the Commission of Eight. All decisions of a general character heretofore made by the Commission of Eight are hereby confirmed, and shall apply to all railroads under governmental operation, unless exempted in said eight-hour law. Decisions which have been rendered by the Commission of Eight, and which apply to individual railroads, shall remain in effect until superseded by decisions of the Railway Board of Adjustment No. 1 made in accordance with this understanding.

7. The Board of Adjustment No. 1 shall render decisions on all matters in dispute as provided in the preamble hereof, and when properly submitted to the board.

8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the management and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 1, when properly presented, subject always to review by the Director General.

10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by

such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

11. No matter will be considered by the Railway Board of Adjustment No. 1 unless officially referred to it in the manner herein prescribed.

12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

13. All clerical and office expenses will be paid by the United States Railroad Administration. The railroad directly concerned and the organization involved in a hearing will, respectively, assume any expense incurred in presenting a case.

14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

15. All decisions of the Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the board.

16. After a matter has been considered by the board, and in the event a majority vote can not be obtained, then any four members of the board may elect to refer the matter upon which no decision has been reached to the Director General of Railroads for a final decision.

17. The Railway Board of Adjustment No. 1 shall keep a complete and accurate record of all matters submitted for its consideration and of all decisions made by the board.

18. A report of all cases decided, including the decision, will be filed with the Director Division of Labor, of the United States Railroad Administration, with the chief operating officer of the railroad affected, the several regional directors, and with the chief executive officers of the organizations concerned.

19. This understanding shall become effective upon its approval by the Director General of Railroads and shall remain in full force and effect during the period of the present war, and thereafter, unless a majority of the regional directors, on the one hand, as representing the railroads, or a majority of the chief executive officers of the organizations, on the other hand, as representing the employees, shall desire to terminate the same, which can, in these circumstances, be done on 30 days' formal notice, or shall be terminated by the Director General himself, at his discretion, on 30 days' formal notice.

Signed and sealed this 22d day of March, 1918.

A. H. SMITH,
C. H. MARKHAM,
R. H. AISHTON,
Regional Directors for the Railroads under Government Control.
W. S. STONE,
Grand Chief Engineer Brotherhood of Locomotive Engineers.
A. B. GARRETSON,
President Order of Railway Conductors.
W. G. LEE,
President Brotherhood of Railroad Trainmen
TIMOTHY SHEA,
Acting President Brotherhood of Locomotive Firemen and Enginemen.

March 25, 1918.
GENERAL ORDER NO. 14.

The Committee on Transportation, American Railway Association, having at the request of the Director General submitted a report in connection with the Federal Law, "To save Daylight and to provide Standard Time for the United States," which becomes effective at 2:00 A. M., Sunday, March 31, 1918, the following instructions, based on such report, are hereby issued:

1. At 2:00 A. M., Sunday, March 31st, all clocks and watches in train dispatchers' offices, and in all other offices open at that time, must be advanced one hour to indicate 3:00 a. m.

Employees in every open office must, as soon as the change has been made, compare time with the train dispatcher. Clocks and watches in all offices at the first opening, at or after the time the change becomes effective, must be advanced to conform to the new Standard Time and employees, before assuming duties in such offices, must, after the change is made, compare time with the train dispatcher.

2. Each Railroad will issue necessary instructions and arrange for such supervision and check of the watches of its employees as to insure that they have been properly changed to conform to the new Standard Time.

3. Owing to the varying conditions which will prevail on the Railroads of the United States, it is not advisable to issue a uniform rule or order to cover the details involved in the movement of trains at the period the change in Standard Time becomes effective. Therefore, each Railroad must adopt such measures as may be necessary to properly safeguard the movement of its trains on the road at the time of the change.

March 26, 1918.

GENERAL ORDER NO. 15.

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(a) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company;

(b) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch-point to the clearance point;

(c) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line;

(d) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition;

(e) The railroad company shall have the right to use the track when not to the detriment of the industry;

(f) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention of the Regional Director, who will report thereon to the Director General, if conditions seem to warrant.

4. The requirements of State Statutes and of State Commissions in respect of the construction, maintenance and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the Regional Director, who will report thereon to the Director General, if the conditions seem to warrant.

March 28, 1918.

GENERAL ORDER NO. 16.

In the organization of the various carriers, some doubt appears at times to exist as to the extent to which, if at all, the executive authority in operating matters is divided between the President of the company and the chairman of its Board of Directors, or of some committee thereof.

For the purpose of simplification and definiteness it is ordered that the President of each Company shall be treated by the United States Railroad Administration as the company's principal executive authority, (subject to the Director General), in all matters of operation under Federal Control and that Chairmen of Boards of Directors or of committees thereof shall not exercise functions connected with the operation of the railroads under Federal control.

April 3, 1918.

GENERAL ORDER NO. 17.

TO CHIEF EXECUTIVE OFFICERS OF CAR-

RIERS SUBJECT TO FEDERAL CONTROL:

It is hereby ordered that the following rules and regulations shall be observed and shall govern the recording of and accounting for all transactions which arise during Federal control:

1. For accounting purposes Federal control began as of January 1, 1918. Immediate steps shall be taken by each carrier subject thereto, to open new and separate books of accounts, such as cash books, general and subsidiary ledgers and journals, and all supporting and subsidiary books and records incident thereto, upon which shall be recorded transactions which arise under and are incident to Federal control on and after January 1, 1918. Such books shall be designated and are hereinafter referred to as "Federal Books."

2. The totals of the accounts "Cash," "Demand loans and deposits," and "Time drafts and deposits" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to accounts of the same titles, and credited to a deferred liability account styled "(Name of corporation)—Cash—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Cash—December 31, 1917." All cash transactions subsequent to December 31, 1917, relating to operations prior or subsequent thereto, shall be recorded in the Federal cash book opened as of January 1, 1918.

3. The total of account "Net balance receivable from agents and conductors" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Agents' and Conductors' balances—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Agents' and Conductors' balances—December 31, 1917."

4. The total of account "Materials and Supplies" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Materials and Supplies—December 31, 1917." On the corporate books the amount of such balance should be transferred to a deferred asset account styled "U. S. Government—Material and Supplies—December 31, 1917."

5. In addition to the assets above specified, there shall be likewise transferred to the Federal books and similarly recorded thereon, such other working assets of the corporation as may be mutually agreed upon.

6. There shall be currently entered, upon such Federal books, in the manner and under the rules and regulations prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, all transactions involving revenues, expenses, taxes and rentals, and other items corresponding to those which constitute the basis upon which the standard return to the carrier shall be determined. Such entries shall include corresponding assets and liabilities and the cash settlement thereof; also all transactions involving materials and supplies subsequent to December 31, 1917.

7. Transactions of the corporation, including those arising out of cash receipts or disbursements, which do not affect or which do not enter into and form a part of those used in determining the basis of standard return, such as interest and dividends received or paid, miscellaneous rents, and other similar corporate transactions, including additions and betterments, shall not be recorded on or passed through such Federal books unless such transactions be negotiated and conducted for account of the corporation by or under the direction of the Director General. Where such income transactions are negotiated and conducted by or under the direction of the Director General the transactions shall be recorded on the Federal books but credited or charged to an account to be opened, styled "(Name of corporation)—Corporate income transactions." Concurrently, corresponding entries should be made on the corporate books charging or crediting the accounts prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, the offset being in an account styled "U. S. Government—Corporate income transactions." Where additions

and betterments are made by or under the direction of the Director General, the expenditures shall be charged on the Federal books to a deferred asset account "(Name of corporation)—Additions and Betterments." Concurrently, entries should be made on the corporate books, charging the appropriate accounts and crediting a deferred liability account "U. S. Government—Additions and Betterments."

8. Current or operating assets, other than those prescribed in paragraphs (2), (3), (4) and (5) hereof, such as, balances due from individuals and companies, and liabilities, such as, vouchers, payrolls, etc., which were due to or by the corporation as of December 31, 1917, shall not be transferred in detail to the Federal books; but as and when such assets are collected or the liabilities are paid, they shall be credited or debited as the case may be, on the Federal books to a deferred liability account styled "(Name of corporation)—Assets, December 31, 1917, collected," or to a deferred asset account "(Name of corporation)—Liabilities, December 31, 1917, paid." There should be concurrently made, on the corporate books, corresponding entries debiting and crediting the U. S. Government with assets collected and liabilities paid.

9. Transactions relating to operations as defined in paragraph 6 hereof, if not previously accrued, shall be included in and shall form a part of the operating results of each carrier regardless of the date thereof. Items clearly applicable to the period prior to January 1, 1918, commonly called "lap-overs," shall be ascertained currently, set up on the Federal books, and included in the appropriate accounts as heretofore. At the end of each month, the total of "lap-over" credit items shall be charged to an unadjusted debit account styled "Revenue prior to January 1, 1918," and credited to a deferred liability account styled "(Name of corporation)—Revenue prior to January 1, 1918." The total of "lap-over" debit items shall be credited to an unadjusted credit account styled "Expense prior to January 1, 1918," and charged to a deferred asset account styled "(Name of corporation)—Expense prior to January 1, 1918." Operating revenues which have been accrued currently in accordance with the established practice of the carrier, shall be considered as current revenues and not as "lap-over" items.

10. The accounts between the U. S. Government and the corporation, for which provision is made herein, shall be adjusted in such manner as may be hereafter agreed upon.

11. Inquiries as to the interpretation and application of the provisions of this order and the procedure to be observed under its requirements shall be addressed to the Director of Public Service and Accounting.

April 9, 1918.

GENERAL ORDER No. 18.*

Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control,* provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control"; and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

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* The General Counsel has received the following letter, dated April 9, 1918, from the General Counsel of the United States Railroad Administration, relative to General Order No. 18:

"Please give wide publicity to General Order No. 18 herewith enclosed; and emphasize the fact that the Act of Congress, approved March 21, provides that no process, mesne or final, should be levied against any property under such Federal control.

"This means that judgments can only be paid when payment is provided for by the Director General. If persons insist on suing in spite of this order, no provision will be made for the payment of judgments rendered unless the suits are brought in conformity with the order."

INTERSTATE COMMERCE COMMISSION DECISIONS.

Rates on Press Cloth From Houston Heights, Tex.

Complainant attached the carload and less-than-carload rates on press cloth from Houston Heights, Tex., to destinations in Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and to central freight association and western trunk line territories. It is claimed that the rates on press cloth from Houston Heights to these destinations are unreasonable, and, in relation to the rates from New York, N. Y., Baltimore, Md., and other points at which complainant's competitors are located, to the same destinations, they are unduly prejudicial to complainant. After full investigation of the situation outlined the Commission Held, That joint rates applicable on press cloth in carloads from Houston Heights, Tex., to destinations in the Mississippi Valley are unreasonable to the extent that they exceed the aggregates of the intermediate rates; other rates on press cloth from Houston Heights to the southeast not found unreasonable or unduly prejudicial. Rates on press cloth in the official, western, and southern classification at first class, any quantity, not found unreasonable or unduly prejudicial. Complainant's request for carload rating on press cloth not justified. Rates on press cloth from Houston Heights, Tex., to destinations in central freight association and western trunk line territories not found unreasonable or unduly prejudicial. Fourth section relief denied to carriers maintaining carload rates on press cloth from Houston and Houston Heights, Tex., to Memphis, Tenn.; New Orleans, La.; and Vicksburg, Miss., and comodity rates on press cloth, any quantity, from Houston Heights, Tex., to certain destinations in central freight association and western trunk line territories, but application of Louisville, Henderson & St. Louis Ry. Co. for relief from provisions of the fourth section granted. *Oriental Textile Mills* v. *A. & V. Ry. Co., et. al.*, 48 I. C. C. 31.

Rates on Yellow-Pine Lumber from Louisiana and Mississippi.

Complainants allege that a rate of 16 cents per 100 pounds for the transportation of numerous carloads of yellow-pine lumber from points in Mississippi and Louisiana to Metropolis, Ill., and Paducah, Ky., were unreasonable and unduly prejudicial to the extent that they exceeded the rates contemporaneously in effect to Cairo, Ill. HELD, That the rates on yellow-pine lumber, carloads, from points in Louisiana and Mississippi to Metropolis, Ill., and Paducah, Ky., are not shown to have been unreasonable. *Enochs & Wortman* v. *I. C. R. R. Co., et al.*, 48 I. C. C. 443.

Commission Reverses Finding That Chattanooga Subjected to Undue Prejudice.

In the original report (41 I. C. C. 406) the Commission found that complainant and the city of Chattanooga, Tenn., were subjected to undue prejudice and disadvantage by reason of the existing relation between defendants' rates on sewer pipe, in carloads, from Chattanooga to North Carolina points named in Hinton's tariff I. C. C. No. A-58, and their intrastate rates applicable on the same commodity for like distances within the state of North Carolina. The case was assigned for further hearing to determine what would be reasonable interstate rates and opposition developed against any increase in the North Carolina intrastate rates, intervenors asking that the issue of undue prejudice be reconsidered. This request was not opposed by the other parties and the question of undue prejudice being reconsidered, the Commission HELD, That the transportation of sewer pipe, in carloads, from Chattanooga, Tenn., to points in North Carolina, and the intrastate transportation of the same commodity within North Carolina not shown to be performed under substantially similar transportation conditions. Finding that the North Carolina intrastate rates on that commodity for like distances subject complainant and its traffic and the city of Chattanooga to undue prejudice and disadvantage, and accord North Carolina shippers an undue preference and advantage, contained in the original report, 41 I. C. C. 406, reversed on further hearing. *Chattanooga Sewer Pipe & Fire Brick Co.* v. *Southern Ry. Co., et al.*, 48 I. C. C. 642.

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THE MEMORANDUM

Vol. III No. 10

LAW DEPARTMENT MAY, 1918. SOUTHERN RAILWAY COMPANY

DECISIONS OF SUPREME COURT ON ACCIDENTAL DELAYS IN TRANSIT.

The opinion of the United States Supreme Court in Chicago & Northwestern Ry. Co. v. United States, handed down April 15, 1918, dealing with the subject of accidental delays, is of especial interest as it is the first decision of the Supreme Court on this point. The opinion is re-printed in full below:

Mr. Justice McReynolds delivered the opinion of the Court.

Charging violation of the Act of June 29, 1906 (34 Stat. 607) to prevent cruelty to animals while in transit, the United States sued petitioner for the prescribed penalty and recovered a judgment in the District Court, Northern District of Illinois, which the Circuit Court of Appeals affirmed. 234 Fed. 268.

The statute forbids an interstate railroad carrier from confining animals in cars longer than thirty-six hours, upon written request, without unloading them for rest, water and feeding "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight;" and subjects every such carrier "who knowingly and wilfully fails to comply" therewith to a penalty. Admitting continuous confinement for more than thirty-six hours petitioner defended upon the ground that it was prevented from unloading within the required period by exculpatory accidental and unavoidable causes.

It appeared: The animals were loaded at Ringstead, Iowa, four hundred and thirty-eight miles from destination,—Union Stock Yards, Chicago—at six P. M. October 4th, and as part of a train the car containing them left Clinton, Iowa, one hundred and thirty-eight miles from Chicago, at six P. M. October 5th. The ordinary schedule time between the latter points is nine hours, but without increase of actual moving speed the run had been made in about six. While the train was passing through Proviso, sixteen miles from destination, at 2:48 A. M. October 6th, a drawbar came out and derailed a car. A delay of two hours and fifty-two minutes followed—not undue the carrier contends, but unreasonably long the Government maintains. Later, at Brighton Park an air hose burst causing further delay of twenty-eight minutes. The car reached the stock yards at 9:05 A. M. October 6th—thirty-nine hours and five minutes after being loaded.

In its charge to the jury the trial court said: "Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of due diligence, would have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company.

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier.

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the mat-

ter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work or the division superintendent's work, but the whole thing involved in the transaction of operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six limit they are excused; that is not the law."

The statute must be construed with a view to carrying its humanitarian purpose into effect and the exception in favor of the carrier given proper latitude and enforced in the light of practical railroad conditions. Nothing indicates the running schedule was unduly slow; and the jury were improperly given to understand that, conceding matters were properly handled when accidents occurred at Proviso and Brighton Park, they might nevertheless decide the railroad could have got the car to destination within thirty-six hours if due diligence had been exercised in laying out such schedule. The definition of "due diligence" in the charge was too exacting and misleading. As applied to the facts due diligence did not require, as the court declared, that "whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do."

We find nothing in the Act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. If in the exercise of ordinary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In the Hours of Service Act, 34 Stat. 1415-1416, there is a proviso "that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ." Construing this, in Atchison, T. & S. F. Ry. Co. v. United States, 244 U. S. 336, 343, we said: "It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the Act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. United States v. Dickson, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law." This general principle should also be followed in construing and applying the provision of the statute here under consideration.

The judgment below is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.

GENERAL ORDERS OF THE DIRECTOR GENERAL.

(NOTE.—General Orders 1 to 18, inclusive, were published in THE MEMORANDUM for April, 1918. General Order No. 18, issued April 9, 1918, was amended by General Order No. 18-A, dated April 18, 1918. This order in its amended form, and subsequent orders issued up to May 10, 1918, are printed below.)

April 9, 1918.

GENERAL ORDER No. 18.

Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control,* provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control"; and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.

April 13, 1918.

GENERAL ORDER No. 19.

Pursuant to the Proclamation of the President of the United States, the undersigned, as Director General of Railroads, has taken possession and assumed control of the

Clyde Steamship Company,
Mallory Steamship Company,
Merchants & Miners Transportation Company, and
Southern Steamship Company,

at twelve one A. M., Saturday, April Thirteenth, 1918. Until further order it is directed that:

First. All officers, agents and employees of said Steamship Lines may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

Second. Any officer, agent or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

Washington, D. C., April 22, 1918.

GENERAL ORDER No. 20.

Effective at once, technical and arithmetical examination and checking of all operating bills such as bills for freight and other claims, joint facilities, car repairs, and other similar bills and all statements of accounts such as distribution of freight and passenger revenues and other similar statements, rendered by one carrier subject to Federal control to or against another carrier subject to Federal control, which accrued or which may accrue on or subsequent to January 1, 1918, shall be discontinued. The carrier rendering such statements, bills, etc., shall take the necessary measures to insure the correctness thereof.

Washington, D. C., April 22, 1918.

GENERAL ORDER No. 21.

(I) SIMPLIFIED BASES FOR APPORTIONING INTER-ROAD FREIGHT REVENUES TO CARRIERS PERFORMING THE SERVICE:

(1) Pursuant to the provisions of paragraph (13) of General Order No. 11, dated March 16, 1918, with respect to the adoption of universal interline waybilling, the following regulations will be observed beginning with the May, 1918, accounts in apportioning freight revenues to individual carriers subject to Federal control which perform inter-road freight service.

(2) In cases where interline billing has been in effect covering all or a major portion

of freight traffic interchanged between two or more carriers via the same route, although the interline waybill may not cover the movement from origin to final destination of the traffic:

(a) The waybill destination carrier shall determine, from interline division statements for the period of twelve months ended December 31, 1917, the aggregate freight revenue on interline freight traffic from each initial waybilling carrier separately via each route. There shall likewise be determined the amount apportioned to each individual carrier separately via each route. There shall be included in such aggregate freight revenue, and in the amounts due to each carrier, as their interests may appear, terminal allowances, bridge tolls, lighterage, insurance, and other arbitraries. If the interline method of accounting became effective via any route subsequent to January 1, 1917, the division statements for the longest period obtainable (not exceeding twelve months) prior to May 1, 1918, shall be used.

(b) From the aggregate freight revenue, and the revenue due to each carrier via each route, ascertained in the manner prescribed in the preceding paragraph, the ratio of the revenue allotted to each carrier via each route to the total revenue shall be determined and stated in two figure percents; such percents shall be designated as "road to road" percents. The percents thus determined for each route shall be used for apportioning the revenue from the traffic moving over it on interline waybills to be accounted for beginning with May, 1918, accounts, until and unless otherwise ordered.

(c) When the accounts for commodities moving in large volumes, such as coal, have, as a matter of general practice, been kept separately, separate road to road percents, based on revenues from that class of traffic, may be determined as above prescribed and used in apportioning the revenues therefrom.

(3) In cases where interline waybilling has not been in effect or where it has been applied to only a small part of the traffic moved between two or more carriers via the same route;

(d) Destination carriers of the freight shall apportion and settle the revenues on interline waybills to be accounted for in May, 1918, accounts on bases of established divisions. From the totals of proportions thus settled, destination carriers shall compute two figure percents for traffic from each initial carrier via each route. Such percents are herein designated as "road to road" percents and shall be used thereafter to apportion revenues via such roads and routes respectively, on that class of traffic unless and until otherwise ordered. When traffic moves only in small volume, destination carriers may compute two figure station to station percents based on revenues produced by the application of established division bases, and use such station to station percents instead of the road to road percents.

(e) In the event freight traffic moves during the month of June, 1918, or thereafter via routes over which there were no freight movements covered by interline waybills prior thereto, destination carriers shall apply the established divisions in apportioning the revenue on such shipments during the month in which the traffic first moves. Thereafter, the revenue on such traffic shall be divided on either road to road or station to station percents as may be applicable.

(f) When the accounts for commodities moving in large volumes, such as coal, have, as a matter of general practice, been kept separately, separate road to road percents based on revenues from that class of traffic may be determined as herein prescribed and used in apportioning the revenues therefrom.

(4) In cases where freight traffic moves via unusual or diverted routes over which no divisions apply and via which no experience can be obtained, destination carriers shall apportion the revenues therefrom on a twenty mile block mileage basis, each carrier to be allowed at least twenty miles and originating and terminal carriers an additional twenty miles each as constructive mileage.

(5) The formulæ prescribed herein for apportioning interline freight revenues to carriers performing the service, are intended to preserve, as equitably as practicable, the integrity of the revenues of individual carriers, and their use shall be generally observed. If

by reason of new traffic developments, or the abnormal shifting of traffic, the continued application of the road to road percents herein provided for might seriously distort the revenues of interested carriers, the destination carrier may, upon its own initiative or by request, test apportionment of revenues for a specific month or period by applying the established division bases thereto. If results thus obtained vary substantially from the results obtained by the application of road to road percents as herein provided for, and the change appears to be permanent, application may be made to the Director of Public Service and Accounting to adjust the divisions to such bases as will produce more equitable results. Applications for changed apportionment bases based upon ordinary traffic fluctuations will not be considered.

(II) MODIFICATION OF PRACTICES IN ACCOUNTING FOR FREIGHT AND RELATED REVENUES:

(6) Destination carriers shall completely revise waybills as to rates, classifications, extensions, footings, weights, etc., thus insuring the correctness of the revenues based on tariffs applicable, and they shall account to interested carriers for their respective proportions of such revenues in the manner hereinbefore prescribed. If flagrant or continued use of erroneous rates or classifications be observed by destination carirers, the attention of billing carriers must be specially called thereto. Where ordinary changes or corrections are made in waybilled revenue by destination agents, correction notices need not be made therefor to intermediate or originating carriers, unless advances or prepaid charges be involved.

(7) Paragraph (10) of General Order No. 11 provides that settlements by destination carriers with all other interested carriers shall be accepted as final. This provision discontinues the adjustment among carriers of overcharges and undercharges in revenue, but does not prohibit the adjustment of differences in advances and prepaid items; clerical errors, in addition and divisions, or errors due to omissions, diversions, etc.

(8) Effective at once no apportionment shall be made among carriers of charges absorbed, such as switching, elevation, transfer charges, terminal delivery charges, icing, cost of grain and coal doors and other similar items accruing during Federal control; such absorbed charges shall be borne by paying carrier.

(III) MODIFICATIONS AND INTERPRETATIONS OF GENERAL ORDER NO. 11.

(9) Paragraph (11) of General Order No. 11 prescribes certain forms to be used in preparing Audit Office settlement accounts. Until further ordered, carriers may use such prescribed forms or, they may use those now in use by them in settlement of interline freight accounts until such time as a more complete study is made of the forms which will later be prescribed.

(10) Sub-paragraph (b), of Paragraph (8) of General Order No. 11, provides that: "Only the original and one copy of the waybill shall be made." This provision is hereby amended to the extent of permitting carriers taking such additional copies of waybills as may be necessary to maintain the integrity of the accounts. The first copy must be printed in the same form as the original, but may be on a lighter weight of paper. Any additonal copies beyond the first may be prepared on blank paper.

(11) While Paragraph (8) of General Order No. 11 provides for a standard form of waybill, such order does not prohibit the continuation or adoption of a color scheme for waybills for specific or special traffic when such color scheme tends to expedite or protect the freight.

(12) If, under prevailing practices, freights originating on or destined to points on switching or tap lines are waybilled from or to trunk line junctions or connections with such switching or tap lines and junction settlements are made at such points of connections, such practices, may, until further ordered, be continued.

Washington, D. C., May 2, 1918.

GENERAL ORDER NO. 23.

Each and every carrier subject to Federal control shall render a weekly cash report on Form T-5, as per copy herewith.

The first report shall be rendered as of May 4, 1918.

IN THE MATTER OF ROUTING SHIPMENTS.—Because of its bearing upon General Order No. 1 of the Director General, the following order of the Interstate Commerce Commission, dated April 26, 1918, is here set forth:

It appearing, That the Director General of Railroads' Order No. 1, of December 29, 1917, requires that existing schedules of rates

and outstanding orders of the Interstate Commerce Commission are to be observed; that through routes which have not heretofore been established because of shorthauling or other causes are to be established, and used whenever expedition and efficiency of traffic will thereby be promoted, and that the designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted;

And it appearing, That in interpretation or understanding of the effect and purpose of this order shipments have been or may be sent via routes not provided for in rate schedules and via routes over which the charges are higher than via the routes designated by the shippers, resulting in demands for or collection of charges higher than those provided in the rate schedules under which the shipments were accepted for transportation;

And it appearing, That by direction of April 23, 1918, the Director General has instructed carriers to adjust charges on such shipments in accordance herewith:

It is ordered, That in instances in which, under the Director General's Order No. 1, shipments have been or are sent (a) via routes over which the rates are higher than via the routes designated by the shippers, or (b) over routes not provided for in through rate schedules, carriers participating in such transportation be, and they are hereby, authorized to adjust the charges to the basis (a) of those applicable via the route designated by the shipper, or (b) of those applicable via the route via which the shipments would ordinarily have been sent out.

PASSENGER INJURED IN ALIGHTING FROM CAR—DOCTRINE OF RES IPSA LOQUITUR HELD NOT TO APPLY.—Plaintiff, a man weighing about 190 pounds, was alighting from defendant's car by stepping upon a stool or stepping box about 12 inches square, placed by trainman upon the ground a few inches in front of the lower step of the car for the purpose of reducing the height that passengers would be required to step in passing from the car to the station platform. Plaintiff claimed that the stepping box slipped from under him when he stepped upon it, and he fell, receiving injuries upon which the action was brought. The New York Court of Appeals, in reversing a judgment of the Appellate Division and of the trial court in favor of plaintiff, said:

> "The rule of utmost care so far as human skill and foresight can provide applicable to railroad corporations so far as it relates to its roadbed, the construction of its cars, and the like, is not applicable to a case of this kind. The rule as stated in Kelly v. Manhattan Ry. Co., 112 N. Y. 443, 450, 20 N. E. 383, 385 (3 L. R. A. 74), is as follows:
>
> "' In the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature. The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended.'
>
> "Such is the rule in this case. It is not claimed that the stepping box was defective or that the plaintiff was not given ample time to alight from the car. The box was placed but six or eight inches from the car step, and there is no testimony of any kind to the effect that the place where or manner in which it was placed was careless, improper, or negligent. All of the testimony in the case confirms the claim of the defendant that the box was level and firm and did not move prior to plaintiff's stepping upon it. It is not a case for the application of the rule of res ipsa loquitur against the defendant."

Beltz v. Buffalo, R. & P. Ry. Co. (N. Y.), 119 N. E. 83.

CARRIERS—UNDERCHARGE — LIABILITY OF CONSIGNEE — ESTOPPEL. — The shipper sold goods to the defendant on a delivered basis, but the carrier was not advised of the terms of sale. The carrier failed to demand the full amount of freight charges from the consignee upon delivery of the goods. The consignee paid the amount demanded and made settlement accordingly with the shipper who was and remained insolvent. The shipment was interstate and the freight rates were shown in duly established tariffs. In an action against the consignee for the undercharge it was held the consignee was liable and the carrier was not estopped to sue the consignee by reason of its failure to make demand for the undercharge until after the consignee had made settlement with the insolvent shipper. The court said that the consignee was conclusively presumed to know the tariff rate, hence he knew that he had not paid all the freight charges upon receipt of the shipment. Chicago, M. & St. P. Ry. Co. v. Greenberg (Minn.), 166 N. W., 1073.

INTERSTATE COMMERCE COMMISSION DECISIONS.

HARDWOOD LUMBER FROM BELZONI, MISS., TO GEORGIA POINTS.

It is alleged that the charges assessed on eight carloads of lumber shipped from Belzoni to Atlanta, Dalton, and Columbus, Ga., were unreasonable, unjustly discriminatory, and unduly prejudicial to the extent that they exceeded 14 cents. Reparation and the establishment of reasonable rates for the future was asked. The shipments consisted of oak and gum lumber and were charged class-M rates of 17 cents to Dalton and Atlanta, and 20 cents to Columbus. On February 1, 1915, a commodity rate of 16 cents was established to Columbus, and on May 5, 1915, like rates were made applicable to Atlanta and Dalton. HELD, That the rates charged, as well as the present rates from Belzoni to Atlanta and Dalton have been justified; and that the present rate from Belzoni to Columbus has not been shown to be unreasonable, unjustly discriminatory, or unduly prejudicial. *Belzoni Hardwood Lbr. Co.* v. *Southern Ry. Co., in Mississippi,* 48 I. C. C. 665.

ORDER NOTIFY SHIPMENT—BILL OF LADING SURRENDERED TO CARRIER AFTER DELIVERY—DRAFT PAID FOR WITH WORTHLESS CHECK—ESTOPPEL.—A shipment was made to shipper's order notify A, and the bill of lading with draft attached was forwarded to a bank at destination. The carrier delivered the shipment to A before the bill of lading was surrendered but A afterwards surrendered the bill of lading to the carrier. A obtained the bill of lading from the bank by paying the draft in part with the check of a third person, which proved to be worthless. In an action by the shipper against the carrier it was held that the carrier was not liable, since title to the goods passed to A notwithstanding the partial failure of consideration; and it was immaterial that the carrier neglected to require the evidence of ownership until after delivery.

It further appeared that the shipper received a partial payment from the notify party, which he retained after he had full knowledge of the circumstances, and with such knowledge made claim against the notify party for the balance and entered suit against him. This conduct was held to constitute a ratification of the delivery and a waiver of the shipper's rights, if any, against the carrier arising out of the supposed misdelivery. Midland Linseed Co. v. American Liquid Fireproofing Co. et. al. (Ia.), 166 N. W. 573.

CARRIERS—EXPEDITED SERVICE—MEASURE OF DAMAGES.—Action was brought by the plaintiff against defendant delivering carrier, for $63.71 actual damage to a shipment of machinery, $1,155 damages resulting from delay in receiving the shipment, which prevented the plaintiff from running his factory, and $840 representing cost of repairing the machinery and loss due to inability to use it during the time it was being repaired.

Plaintiff alleged that the freight soliciting agent of the defendant had assured him that the shipment would reach destination within four days. The shipment was interstate and made at the regular rates, there being no special rates published for expedited service.

Held that any agreement or assurances for expedited service, not based on a tariff providing for such service, was a discrimination and conferred no rights on the shipper. The court held that under the clause in the bill of lading providing that the amount of any loss or damage for which the carrier should be liable should be computed on the basis of value of the property at time and place of shipment, plaintiff was entitled only to the actual damage to the property and not to any consequential damage, arising either from its delayed delivery or from any inability to use it for any period of time because of its damaged condition. Plaintiff was therefore allowed to recover only the item of $63.71 actual damage to the goods. Emil Grossman Mfg. Co. v. New York Cent. R. Co. 169 N. Y. Supp. 213.

RATES ON STEEL RAILS FROM HUNTINGTON, W. VA., TO POINTS ON THE NORFOLK & WESTERN.

In the case of the *West Virginia Rail Co.* v. *B. & O. R. R. Co.*, 26 I. C. C. 622, the Commission prescribed rates for the transportation of steel rails, in carloads, from Huntington, W. Va., to certain specified stations on the Norfolk & Western Ry. in that state and in Virginia. Complainant was not satisfied with the result of that proceeding, or with the existing rates to all other stations on the lines of the Norfolk & Western Ry. west of Salem, in Virginia, and filed this complaint. HELD, That the rates for the carriage of

light steel rails from Huntington to points of destination on the Norfolk & Western Ry. in Virginia and West Virginia are not shown to have been or to be unreasonable, unjustly discriminatory, or unduly prejudicial. *West Virginia Rail Co.* v. *C. & O. Ry. Co., et al.*, 48 I. C. C. 600.

MACHINERY FROM ATLANTA AND SCRAP IRON FROM AUGUSTA, GA.

Complainant attacked as illegal and unreasonable sixth-class rate of 51 cents on machinery, carloads, from Atlanta, Ga., to Harrisburg, Pa., and sixth-class rate of 39 cents on scrap iron, carloads, from Augusta, Ga., to Harrisburg. The cars from Atlanta consisted of a discarded electric power unit, an engine and dynamo combined, one car containing only the fly wheel in six sections; the other, the engine base and various other parts. It was admitted, however, that the parts shipped were in themselves intact, and that at a considerable expense the unit could have been repaired and used as before. It was not established that these shipments in fact consisted of scrap iron or steel. HELD, The charges collected on the shipments from Atlanta were legally applicable and not shown to have been unreasonable. The car from Augusta contained discarded machinery from a cotton oil mill, consisting of two pieces constituting a rope transmission pulley, 20 oil mill crusher jaws, four pieces from oil presses, and a sash weight. One spoke in the pulley was cracked. The evidence as to its servicability was conflicting. The heavy castings could not be broken without the use of special machinery, such as is used at foundries for the purpose of preparing large castings for melting. Complainants testified that these castings were partly worn or broken and unserviceable, and the inspector testifying for defendants admitted that if the pulley had been broken up he would have passed the carload as scrap. HELD, That the rate charged on the shipment from Augusta was illegal to the extent it exceeded $3.30 per net ton. Stein Junk Co. v. Southern Ry. Co. et al., 48 I. C. C. 703.

ALLOWANCE TO SHIPPER FOR SWITCHING SERVICE NOT REQUIRED.

Defendant's refusal to make an allowance of $3 per car on lumber and other products switched between complainant's plant and the point of interchange with defendant's line, and for the weighing of such shipments was attacked as unreasonable and in violation of Section 15 of the Act. Complainant's mill is reached by a siding 6,500 feet long, while its stills for manufacturing naval stores are located nine miles from defendant's line. It owns and operates about 30 miles of track of which only 5½ miles, including the tracks from the main line of defendant's road at Wiggins to the mill, an interchange track, a track scale track, and tracks running to different units of the mill, were under consideration by the Commission. In 1902 an agreement was made which provided that complainant should construct at its own expense and on its own right of way side tracks from defendant's main line at Wiggins to its mill and ship its products over defendant's line; defendant agreed to reimburse complainant for the cost of the rails and angle bars, maintain and keep the track in repair and do all necessary switching free of charge. This arrangement was set aside by a new contract, in 1904, which provided that complainant should do its own switching and weighing, furnish its own crew and equipment and pay defendant for the rails and angle bars while defendant was to make complainant an allowance of $2.50 per loaded car in lieu of performing the switching service. In 1906 this allowance was increased to $5 per car. Several months later defendant notified complainant that it could not longer make any switching allowance as it had been advised by counsel that to do so was unlawful and thereafter declined to make any allowance therefor until September, 1916, on which date, following the fourth supplemental order in *The Tap Line* Case, 31 I. C. C. 490, it applied to the Commission for permission to switch the cars from complainant's mill to the interchange point at Wiggins, or make an allowance to complainant of $2.50 per car. The Commission approved an allowance of $2.50 per car on all carload shipments of lumber switched on and after September 11, 1916, the date of the application. Complainant now seeks an allowance of $3 per car, the maximum allowed under *The Tap Line case, supra.* Under the facts disclosed in this case, Held, That in the absence of an unlawful discrimination, defendant was under no obligation to perform the switching service requested of it by complainant; and that defendant's refusal to make complainant an allowance for the service it performed was not unlawful or unreasonable. Finkbine Lbr. Co. vs. Gulf & S. I. RR Co., 48 I. C. C. 705.

LUMBER FROM NORFOLK & WESTERN POINTS IN VIRGINIA AND WEST VIRGINIA.

Complainants attacked the rates on lumber from the territory west of Roanoke, Va., east of Norton, Va., and Bristol, Va.-Tenn., and east and southeast of Wharncliffe, W. Va., points on the Norfolk & Western to northeastern destinations. Just north of this territory lies a competitive lumber-producing territory in West Virginia served by the lines of the Chesapeake & Ohio, the Baltimore & Ohio, and the Western Maryland. The rates on lumber to northeastern destinations are materially lower from this latter territory than from the former territory to the same destinations, and complainants contend that the rates should be substantially the same. This, in general, is the main ground of complaint, although other allegations raise incidental issues. HELD, That rates on lumber, carloads, from points on the Norfolk & Western and its connections in Virginia and West Virginia to points in central Pennsylvania, New Jersey, New York state other than New York, Connecticut, and Rhode Island are unreasonable and unjustly discriminatory to the extent that rates on lumber other than oak, spruce, and hemlock exceed the rates on oak, spruce, and hemlock. Carload rates from the same territory, on lumber other than oak, spruce, and hemlock, to Baltimore and Philadelphia and points grouped with either destination not found unreasonable, but found unjustly discriminatory; removal of discrimination required. Except for the unjust discrimination found in the maintenance of different rates on different kinds of lumber from originating points on the Norfolk & Western and its connections, rates from these points of origin found not unduly prejudicial as compared with rates from the Charleston, W. Va., district to the same destinations. Except for the unjust discrimination found in the maintenance of different rates on different kinds of lumber from the same originating points, rates to Reading and Philadelphia not shown to be unduly prejudicial to points in central Pennsylvania, north of Harrisburg. Honaker Lbr. Co. v. Norfolk & W. Ry. C., et al., 48 I. C. C. 715.

RATES ON SUGAR TO THE SOUTHEAST.

Several complaints attacking rates on sugar to the southeast were consolidated into one proceeding which involved sugar rates from New Orleans, La., to the southeast which were attacked as unreasonable and discriminatory, as compared with the rates from the north and south Atlantic ports to the southeast. Also the widening of the spread between the carload and less-than-carload rates was alleged to result in discrimination against New Orleans jobbers. Another feature of the proceeding involved the rates from the north Atlantic ports to Macon which were attacked as unreasonable and discriminatory compared with the rates from New Orleans to Macon. At the hearing, however, this latter feature the complainant sought to withdraw, changed conditions and a more mature consideration of the new adjustment being given as the reasons for the request. HELD, That the general readjustment of commodity rates on sugar from New Orleans, La., and from the north and south Atlantic ports to points in the southeast had been justified and the complainants were dismissed. The Southeastern Sugar Cases, 48 I. C. C. 739.

CORDWOOD BETWEEN POINTS IN MISSISSIPPI AND LOUISIANA.

Complainant attacked the rates on cordwood, carloads, between points on the New Orleans & Northeastern in Mississippi and Louisiana as unreasonable. The rates attacked, except those to New Orleans, are distance rates, ranging from four cents for distances up to 80 miles, to seven cents for 200 miles. The rates from points on its line in Mississippi to New Orleans are specific commodity rates equal to the distance rates and apply from 50 stations for distances of from 49 to 196 miles. Prior to March 12, 1916, these rates were upon a per cord basis, ranging from $1.25 to $1.75 per cord. HELD, That the rates attacked have been found justified. Carrollton Excelsior & Fuel Co. v. New Orleans & N. E. R. R. Co., 49 I. C. C. 6.

CONNECTING CARRIERS — LIABILITY FOR PENALTY.—Held that the South Carolina statute making connecting carriers agents for each other does not make the defendant carrier liable for the statutory penalty for delay, where the delay occurred on the line of a connecting carrier. Marion Cotton Oil Co. v. Atlantic Coast Line R. Co. (S.C.), 95 S. E. 336.

CONFERENCE RULING INTERPRETED.

In conference on May 4, 1918, the Commission approved the following interpretation of Conference Ruling 314, concerning the Collection of Undercharges:

RULING 314 INTERPRETED—In conference ruling 314 the Commission held it to be the duty of common carriers to exhaust their legal remedies to collect undercharges. But the Commission has pointed out from time to time and now holds that this ruling does not require the filing of a suit where the party liable for the undercharge cannot be located, or service cannot be made, or where upon investigation by the carrier in good faith it is found that legal process would be futile and ineffectual.

RAILROADS—EMPLOYEE REPAIRING INTERSTATE TRACK—ENGAGED IN INTERSTATE COMMERCE.—Plaintiff was employed by defendant in the operation of a loader machine on defendant's work train. When the work train was ordered into a sidetrack to allow a fast passenger train to pass, plaintiff started to the caboose from the loading machine car, as was the custom when the work train moved from one place to another. He was ordered by the conductor to go back to the car containing the loader machine and fix up the boom used in connection with loading rails on the work train, which order plaintiff obeyed. He then found that the speed of the work train was too great for him to get off the loader machine car and go to the caboose at the rear of the work train; consequently he sat down on the end of an empty flat car between the loader machine car and another flat car partly loaded with rails. Due to the speed of the work train, and to the absence of standards from the partly loaded car of rails, the rails fell and were thrown off said car, and resulted in the injury complained of. Defendant claimed that it was an interstate carrier, and that plaintiff at the time of his injury was engaged in repairing a track used in such commerce, in order that such commerce might be successfully carried on, and that, therefore, its liability, if any, existed under and by virtue of the Federal Employers' Liability Act. This contention was sustained. Hargrove v. Gulf, C. & S. F. Ry. Co. (Tex.), 202 S. W. 188.

EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK—COMMON LAW RULE AS CONSTRUED BY FEDERAL COURTS APPLIES.—In a case arising under the Federal Employers' Liability Act, the Texas Court of Civil Appeals holds that the question of assumed risk involved must be determined by the provisions of said act and by the common law, as recognized and construed by the federal courts. Quoting section 4 of the act, the court said:

> "It has been repeatedly held by the federal courts, and by the appellate courts of this State following those decisions, that this provision of said act of Congress leaves unimpaired the common-law defense of assumed risk, except in cases where the injury complained of was caused by a violation of some of the provisions of said act, which were made for the benefit of such employees; and since the question here to be determined does not involve the violation of any federal enactment for the safety of employees, the doctrine of assumed risk, as it was known to the common law, and as the same has been construed by the federal courts, must govern."

Judgment for the plaintiff was reversed. Hargrove v. Gulf, C. & S. F. Ry. Co. (Tex.), 202 S. W. 188.

KILLING UNREGISTERED DOG ON TRACK.—CARRIER NOT LIABLE UNDER TENNESSEE LOOKOUT STATUTE.—A female dog which was running at large and had not been registered was killed by defendant's train, and plaintiff recovered in the lower court a judgment for the value of the dog, $25.00. The Supreme Court of Tennessee reversed the lower court, holding that the act of 1903, providing that "it shall be unlawful for any person to allow a dog belonging to him, or under his control, or that may be habitually found on premises occupied by him, or under his immediate control, to go upon the premises of another, or upon a highway," etc., was designed "to keep loose dogs away from such places, and was for the protection of such premises." The court said:

> "We have recently suggested in the case of Chattanooga Railway & Light Co. v. Bettis, 202 S. W. 70, that a plaintiff who violated a statute intended for the protection of the defendant he was suing was guilty of contributory negligence. We think that such is the law; and, inasmuch as the statute above quoted was intended for the protection of railroads as highways of the State to keep dogs off the right of way, the plaintiff, who allow-

ed his dog to go upon such highway unlawfully, must be held to be guilty of contributory negligence barring recovery."

The court further held that, if the action be considered as one brought for a violation of the statutory precautions requiring railroad companies to keep engineer, fireman, or some other person upon their locomotives always upon the lookout ahead for persons, animals, or other obstructions, recovery must be denied by reason of the statutory provision that "the running at large of female dogs, not registered as hereinafter provided, is hereby declared to be a public nuisance," saying:

"We cannot think that it was ever intended that the rigid requidements of sections 1574-1576 of Thompson's Shannon's Code with reference to the duties of railroad companies as to obstructions on their tracks were intended to be applied for the protection of a public nuisance. This court has in repeated decisions declined to extend these statutory provisions for the protection of employees of the railroad companies. Certainly these outlawed dogs cannot be included as beneficiaries of such statutes."

Cincinnati, O. & T. P. R. Co. v. Ford (Tenn.), 202 S. W. 72.

Stoppage in Transitu—Delivery to Receiver of Bankrupt Estate—Conversion.—While a shipment was in transit the consignee was adjudicated a bankrupt and the shipper ordered the carrier to hold the shipment. The carrier, instead of holding the shipment at Butler, Wis., sent it on to Chicago and held it there, and demanded of the shipper proof of ownership before it would undertake to make delivery in accordance with shipper's instructions. While the car was still being held the Bankruptcy court issued an ex parte order directing the carrier to deliver the goods to the receiver of the bankrupt consignee. Suit was brought by the shipper against the carrier for the value of the shipment, the shipper's contention being that the transfer of the shipment from Butler to Chicago was a conversion, and secondly that the delivery to the receiver was a conversion notwithstanding the court order, which plaintiff contended the court had no jurisdiction to make.

Held that the transfer of the goods to Chicago was not a conversion; and that even though the court order be held invalid, nevertheless the delivery of the goods to the receiver, an officer of the Bankruptcy Court, was *damnum absque injuria,* since the effect of such delivery was not to lose the goods to the plaintiff but merely to transfer the possession to another stakeholder (the Bankruptcy Court) vested with authority to determine the rights of the several claimants. Morgan v. Chicago & N. W. Ry. Co. (Wis.), 166 N. W. 777.

Carriers—Special Damages for Delay—Sufficiency of Notice.—A shipment of moving picture films was delivered to the carrier for transportation. The carrier was advised of the nature of the shipment and told that it should be rushed account of showing. In an action for damages for delay plaintiff sought to recover the receipts or profits which he would have realized if the films had not been delayed. He showed that they were high class films intended for the Christmas Day performance which had been extensively advertised and to which the price of admission was 10 cents. On account of the failure of the films to arrive plaintiff was unable to give the show as advertised and had to substitute less attractive films. Fewer people came to see the substituted show and plaintiff was able to ask only 5 cents admission thereto. Held that the notice given was not a sufficient basis for the recovery of the special damages claimed, since it was nothing more than notice of the general purpose for which the shipment was intended and did not indicate the special circumstances which would result in the damages claimed. Chapman v. Fargo, 223 N. Y. 9, 119 N. E. 76.

Carriers — Charges — Liability of Consignor.—In an action against the consignor for freight charges on an intrastate "collect" shipment which the carrier had delivered to the consignee without collecting the freight, it was held that the consignor was liable. The court said:

"The carrier does not, by waiving its lien and delivering the goods to the consignee before payment of the freight, release the consignor from liability. The carrier may collect from either the consignor or the consignee, in the absence of a special contract." Southern Cot. Oil Co. v. So. Ry. Co. (Ga.), 95 S. E. 251.

OFFICE NOTES AND COMPILATIONS OF AUTHORTIES.

EDITORIAL NOTE.—In the course of the work of the staff of the General Counsel, a large number of legal notes and compilations of authorities have been prepared from time to time. It is proposed to publish some of this material in this column of THE MEMORANDUM for the purpose of preserving it in convenient form and for the benefit of counsel. It will be printed as of the date of preparation.

DUTY TO KEEP LOOKOUT FOR EMPLOYEES IN YARDS.

A car repairer, 40 years old, was struck by some moving cars, receiving injuries which resulted in his death. The deceased leaves a widow and five children. At the time of his death he was working on the night shift, and was making eighteen cents per hour. At the time he was injured he was on his way across the yard from the inspector's shanty to inspect a train, which had just come in the yards. On track No. 2, which was between his shanty and the incoming train there were two cuts of cars with an opening of about a car's length between them. This opening was about 15 car lengths from the further end of the shortest cut of cars. When deceased reached this opening instead of coming around the cut of cars he attempted to pass between them; just at that moment the longer cut of cars was struck on the end by a shifting engine, knocking him down and inflicting the injuries above described. When the yard engine was about to come in contact with the cut of cars, a brakeman signaled the engine down, but his lantern went out and the engine continued to move after striking the cars in question, which caused the movement which resulted in the accident. Deceased had a lighted lantern in his hand at the time, but on account of a curve in the track he was not seen by the engineer, or by any member of the crew. The only eye-witness to the accident was a yard clerk who was in the yard checking cars. Deceased had no duties to perform on track No. 2 at the time of the accident. There are no walkways across the tracks or any openings kept on them near where the accident occurred. However, when the tracks are not filled with cars people continually walk across the yard at any place where they can find a sufficient opening. By walking around the cut of about 15 cars he could have proceeded on his way without danger to himself, but he chose the shorter and more dangerous way which resulted in his death.

The question involved here is whether or not the Company complied with its duty to furnish its employee with a reasonably safe place in which to perform his work, and if it failed in this regard, was his conduct contributory negligence.

The general rule is that masters owe to their servants the duty of providing them a reasonably safe place in which to work and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the service required and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty, and is not one of the perils or risks assumed by the servant.

But an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially result from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them.

So where a servant walking across the track is not engaged in work demanding his attention, it is his duty to see and hear approaching trains, because he can give his attention to what is taking place about him. Under these circumstances it is apprehended that a servant is held to the same measure of care in looking and listening for approaching trains as a traveler.

20 Am. & Eng. Encyc. (2d Ed.) 125.

A striking illustration of how the courts regard the obligation of an employee working in the yard to look out for himself, is found in the Tennessee statute and the decisions of that State construing it.

In Tennessee it is provided by statute that every railroad company shall keep engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

Shannon's Code 1896, Sec. 1575.

In construing this statute the Tennessee courts have held that in relation to its servants and employees, who are moving about or

across the track in the performance of their several duties, the statute is not applicable, when the company is running its engines and cars about its tracks or yards in making up its trains and switching its engines from one track to another; but that in such case the Company will be liable for injuries resulting from the misconduct or negligence of its agents, the liability to be determined by the general common law principles applicable to such cases.

L. & N. R. v. Robertson, Admx., 9 Heisk. 276.

Haley v. Mobile & Ohio R. 7 Baxter, 239.

East Tennessee, Va. & Ga. R. v. Rush, 15 Lea 145.

In delivering the opinion of the court in L. & N. R. Co. v. Robertson, Admx., *supra*, Judge McFarland said:

> "This statute makes no exception, but it seems to us unreasonable and utterly impracticable to apply it strictly to the running of engines and cars about the depots or yards of railroads, and in relation to the hands or employes of the road, who are moving across the track in the discharge of their several duties. To require that whenever any one of these employes shall be upon the track, when the engine is running at the rate of three or four miles an hour, that the whistle shall be sounded, and the brakes put down, and every effort used to stop, seems to us not only to be utterly unnecessary, but also that it would render it almost impracticable to make the necessary movements of the engine and

In North Carolina, where the accident in question occurred, it has been repeatedly held that it is negligence for a railroad company to suddenly run a string of cars over a much frequented place without warning or signal, or any one on the rear of the train to give notice.

Ray v. Railroad, 141 N. C., 84.

Hudson v. Railroad, 142 N. C., 202.

But the precise question involved has never been presented to the Supreme Court of that State; that is, whether it is negligence for a railroad company to move a cut of cars without having a lookout on the lead end.

The rule seems to be that as to employees a railroad company is under no obligation to ring the bell or sound the whistle upon a switching engine in its yards, for the purpose of notifying such employees, who are familiar with the operations of the yard.

Elliott on Railroads, Sec. 1248.

In a case decided by the supreme Court of the United States in 1892, this doctrine is approved in an opinion by Justice Brewer. The facts were that a track repairer was at work upon a track with his back to an engine slowly backing two cars upon the track where he was at work. As an employee of long experience in that yard he was familiar with the moving of cars by the switching engine, and there was no obstruction to prevent his seeing the engine. In holding that there could be no recovery, Justice Brewer said:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switching engines moving forward and backward would simply have tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard were familiar with the continuously recurring movements of the cars and would take reasonable precaution against their approach. * * * It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to the employes who had all the time knowledge of what was to be expected."

Aerkfetz v. Humphreys, 155 U. S. 418.

There are two recent decisions in North Carolina which are quite similar to the case at bar. They are the case of Beck v. Southern Railway Company, 59 Southeastern Reporter, 1015; 62 Southeastern Reporter, 883, and Farris v. Southern Railway Company, 66 Southeastern Reporter, 457.

The Beck case occurred at Spencer, North Carolina, in the same yard where the present case arose. He was a boy of 16 years of age, and in taking the customary way home across the yard from his work, attempted to pass between two cars and was killed, by reason of an engine, without warning or signal, suddenly striking against one of the cars. The space between the cars in question was several feet, they being chained together because they had no bumper or drawhead. At the close of the plaintiff's testimony the motion of the defendant to dismiss was granted. On appeal it was held as error, and a new trial was granted. In the opinion of the

Court, Clark, C. J., after commenting on the condition of the yard at Spencer and the custom existing there of going under or between cars when the tracks were blocked, said:

> "The defendant knowing this fact was guilty of gross negligence, in that it did not provide either subway or overhead bridges, or at least lift bars with a guard at each passway."

On the point of the contributory negligence of the deceased, the Court said:

> "The sudden attachment of the engine, which was done around a curve so that the intestate did not see it attached, and pushing back the cars, without signal or any one on the rear to give notice, it would seem was the proximate cause, and not the conduct of the boy, who was getting across these numerous tracks the best he could, as he and so many others were daily required to do. If there was any contributory negligence, whether that or the negligence of the defendant was the proximate cause of the death of the boy was a matter which should be passed on by the jury, not by the court."

Justice Brown dissented on the ground that the evidence presented a "bald case" of contributory negligence. This dissenting opinion is quite elaborate and collects many authorities, sustaining the proposition that where one attempts to cross the tracks between the cars and trains which he either knows, or might know by observation and use of his natural faculties, are likely to move at any moment, he is guilty of such gross negligence, if not recklessness, that he cannot recover for injury, and also that where there is a safe method of performing work at hand and the servant selects a dangerous method, he cannot recover.

On a new trial there was a judgment for the plaintiff, which on appeal was reversed. 62 S. E. Rep. 883.

In a per curiam opinion the court said:

> "When this case was before this court at the last term the judgment of nonsuit was set aside, and a new trial was ordered. On the second trial the evidence relating to the conduct of the intestate as bearing upon the issue of contributory negligence is much clearer and stronger. It now appears not only from the evidence offered by the defendant, but also plainly from the evidence of the plaintiff that the deceased by walking from 70 to 90 feet could easily have walked around the train of cars, and that he had a perfectly safe way to reach his home instead of climbing between the two cars chained together on the live track in constant use.
>
> "Upon all the evidence as presented on the second trial, we are of opinion that the deceased was guilty of contributory negligence, and that the motion to nonsuit should have been granted. It is so ordered."

It will be noted that this Beck case is strikingly similar to the case at bar. In both cases the employee by taking a longer route had a perfectly safe route, but chose instead a shorter route and more dangerous one, and in each case lost his life.

In the Farris case, *supra,* the facts were as follows:

Farris was an employee of the defendant, working in the yards at Asheville, North Carolina. It was a custom for the employees to cross the yards several times daily going to and from their work. By walking across the yards for the purpose of going to his dinner, Farris's hat was blown off by the wind, and as he stooped to pick it up he was struck by four cars of the defendant company. These cars were making what is known as a "flying switch;" no bell was rung, or other signal given, and no watchman was on the cars to give warning. The engine which made the flying switch had acquired a speed of 35 or 40 miles an hour and was making considerable noise. Farris was in close proximity to this engine when struck. The Court in affirming judgment for the plaintiff, said:

> "It can easily be inferred that, in the close presence to the rapidly moving engine, the intestate could not have heard any noise from the moving cars. He had just crossed in safety the track upon which these cars were noiselessly moving, unguarded by any person stationed on them to warn him of their approach. His position and purpose were known to the defendants. The danger of a misstep, or of deviating from an exactly straight line, was obvi-

ous to the defendant engineer. The rapidly moving engine, passing intestate, was naturally calculated to make him draw away from it. The natural impulse was to grab at his hat and to stoop to pick it up. A watchful brakeman on the cars 'keeping a continuous outlook' would assuredly, seeing his position of peril, have warned the intestate, and by such timely warning a human life would have been saved. Sawyer v. Railroad, 145 N. C. 24, 58 S. E. 598. * * * While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well considered decisions of this and other courts, yet 'it cannot always be said that he is guilty of contributory negligence as a matter of law because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company, or his attention was rightfully directed to something else as well.' 3 Elliott on Railroads, Sec. 1166a. Or that he failed to look in opposite directions at the same moment of time. As is said by Mr. Justice Hoke is Sherrill v. Railroad, 140 N. C. 252, 52 S. E. 940: 'It is further held that, negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed.' Inman v. Railroad, 149 N. C. 123, 62 S. E. 878; Morrow v. Railroad, 146 N. C. 14, 59 S. E. 158. It must not be overlooked in reaching a conclusion in this case that the act which occasioned plaintiff's intestate to be killed was immediately caused by the rapidly moving engine passing within two feet of him at a time and place where defendants admit that they knew the intestate would be crossing, and at a time and place where the uncontradicted evidence shows that between 100 and 150 employes of defendant company and others were accustomed to cross the tracks of the yard."

The North Carolina decisions also hold that where employees in yards are absorbed in their duties, it is the duty of the company to keep a reasonable lookout on moving trains for the purpose of notifying such employes of their approach.

Smith v. Atl. C. L. R. Co., 132 N. C. 819.
Lassiter v. Railroad, 133 N. C. 244.
1912.

Since the above authorities were collated, the Supreme Court of North Carolina in the case of Hinson v. Atlanta & Charlotte A. L. R. Co., 172 N. C. 646, 90 S. E. 772, decided December 6, 1916, has passed upon the precise question involved in the above discussion —namely, whether or not it is negligence for a railroad company to move a cut of cars without having a lookout on the lead end. Plaintiff was a hostler in the yards of the railway company, and started home across the yards and switching tracks of defendant. On his way he encountered a train of coal cars connected together that had been run in on one of the sidetracks that day. He looked up and down the train of cars and decided to cross the track underneath the cars, and started across underneath the drawhead connecting two of the cars. While he was under the drawhead and putting his leg out across the rail to get out, an engine struck the train with sufficient force to move the train and drive a wheel over his leg. When the engine struck the train plaintiff, according to his own statement, was under the drawhead and had extended his leg across the track to get out. He could not have been seen from the engine or tender or from the cars.

There was no evidence except that of plaintiff. Defendant's motion for nonsuit was sustained, and on appeal by plaintiff, the Supreme Court affirmed the lower court. In the course of his opinion, Justice Brown said:

> "Plaintiff's evidence fails to disclose wherein the defendant failed to discharge any duty it owed him. The habit of employees going under trains instead of around them is not sufficient to charge an engineer with notice that plaintiff was under the drawhead. Plaintiff was a workman of long experience, and entirely familiar with the uncertain movements of engines and cars in the yards. The defendant had a right to move cars and engines on the yards as the necessities of its business required, and the only duty under the

circumstances that it owed plaintiff was to refrain, if possible, from injuring him in case his precarious condition had been discovered. There is no pretense that plaintiff's condition was discovered by anyone on the engine or tender. The defendant is not required to ring bells and blow whistles every time a car is shifted or a train moved in its switching yards, for the reason stated by Justice Brewer in Aerkfetz v. Humphreys, 145 U. S. 418," (quoting the extract above taken from that case).

DEMURRAGE — PRIVATE CARS — PRIVATE TRACKS—STORAGE IN ADDITION TO DEMURRAGE.—In an action involving a claim by the railroad for demurrage and storage charges on cars of gasolene consigned to the defendant, it appeared that the cars belonged to various private owners and the charges accrued while they were standing on a siding constructed for the defendant on land a portion of which belonged to it and a portion to the railroad company. Under the contract between the railroad company and the defendant, the railroad company had the right to use the track for the use of third persons provided such use did not interfere with defendant's use.

Held under the tariff that the cars were subject to demurrage and also storage charges in addition, the rules providing that carload shipments of explosives or other dangerous articles should be subject to both demurrage and storage. Pittsburgh, C. C. & St. L. R. Co. v. Freedom Oil Works, 247 Fed. 573 (W. D. Penna.).

REPARATION CLAIM—STATUTE OF LIMITATION—JURISDICTION OF INTERSTATE COMMISSION—MANDAMUS.—Through error in printing its tariff the Louisville & Nashville Railroad Company increased the rate on coal between certain points in different States from $1.00 per ton to $1.10 per ton. The change, however, was overlooked and freight charges were collected at the old rate of $1.00 per ton. About four years later the undercharges were collected, and nine months after they were collected, the relator filed its petition with the Interstate Commerce Commission asking for an order permitting the railroad company to refund the charges collected in excess of the charges on the basis of the $1.00 rate. The Commission held, in another branch of the case, that the rate of $1.10 was unreasonable to the extent it exceeded the former rate of $1.00, but held that it was without jurisdiction to entertain the claim for refund of the excess charges by virtue of the limitation prescribed by Section 16 of the Act to Regulate Commerce providing that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time time the cause of action accrued, and not after." Relator thereupon filed a petition for mandamus in the Supreme Court of the District of Columbia to compel the Commission to entertain the petition for relief of the unreasonable charges paid.

HELD (1) that the two-year period of limitation is jurisdictional and the Commission cannot entertain a claim barred thereby even though the defendant waive the benefit thereof. (2) That the two-year period begins to run from the time the unreasonable charge sought to be recovered was collected and not, as the Commission held, from the date of delivery of the shipment. (3) That the Commission having refused to entertain the case on account of an erroneous interpretation of its jurisdictional powers, mandamus would lie to compel it to entertain the petition. The fact that the Court's decision on the question of the writ of mandamus, and the Commission's decision on the petition for refund of the overcharges depended on the same thing,—namely the time when the two-year period of limitation begins to run—and hence the Court's decision would determine the Commission's, was held not to prevent the issuing of the mandamus. United States of America ex rel. Louisville Cement Co. v. Interstate Commerce Commission, decided by U. S. Sup. Ct., April 29, 1918.

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THE MEMORANDUM

Vol. III No. 11

LAW DEPARTMENT JUNE, 1918. SOUTHERN RAILWAY COMPANY

FOOD ON DINING CARS.

A number of interesting decisions have been made in suits by passengers claiming damages for illness resulting from being furnished unwholesome or impure food on dining cars operated by railway companies. The result of these decisions is that the law is well settled that the carrier is not liable as an insurer against sickness or injuries caused by the eating of unwholesome food but is only bound to exercise ordinary care. It warrants merely that the food it serves is of that class of food which is generally accepted as fit for ordinary human consumption, and that it has used that degree of care, in the selection and preparation of the food, which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. Therefore, proof merely that plaintiff ate food on defendant's dining car, and thereafter became sick from the effects of the food, is not sufficient to charge the defendant with damages, in the absence of further proof of negligence. It must be shown that, in the selection and preparation of the food, the defendant failed to exercise the degree of care which the law requires, and that the injury was the result of such negligence, in order to render defendant liable.

In Valeri v. Pullman Company, 218 Fed. 519, an action was brought to recover for personal injuries sustained by plaintiff through eating food served to her by defendant upon its buffet car. The complaint alleged that the food was unwholesome, but contained no allegation of negligence on the part of defendant, and sought to recover upon an implied warranty that the food was fit for consumption. In an opinion dismissing the complaint upon the merits, the court said:

> "The case at bar comes down to this: In the absence of any specific authority in the federal decisions, is there any ground in reason for imposing upon a restaurant keeper an obligation to furnish wholesome food to his patrons at all hazards; that is to say, is his obligation that of an absolute insurer of his food? Of one thing I feel reasonably clear, that no such obligation was ever imposed upon innkeepers or victualers under the English common law. In spite of the most exhaustive briefs of counsel in this case, no decision of the English courts has been pointed out, indicating the existence of such an obligation, and it seems to me most unlikely that such an obligation was ever recognized in the common law, using that word now in a historical sense, or it would have been enforced in numerous adjudicated cases. The opportunity for actions involving the breach of such an obligation has been far too common, and the absolute liability long imposed upon an innkeeper in respect to the goods of his guests has furnished too close an analogy to such an obligation, to permit the innkeeper to escape if the obligation had ever been thought to exist at common law.
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> "The courts have enforced certain rules of absolute liability in the case of innkeepers, common carriers, owners of vicious animals, manufacturers of poisonous drugs, and in England, under the doctrine enunciated in Rylands v. Fletcher, 3 H. L. 330, in the case of persons who bring upon their lands elements likely to do mischief if they should escape.
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> "My own feeling is that protection to the public lies not so much in extending the absolute liability to individuals, as in regulating lines of business in which the public has a paramount interest in such a way as reasonably to insure safety. In other words, careful and rigorous inspection of running factories, and of food supply, would seem the more effective way of protection than by the imposition

an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which *ex hypothesi* cannot be guarded against by the individual by the exercise of due care. It shifts the loss from the person immediately suffering the injury to a person who has neglected no precaution in supplying the food. This certainly is not in accord with the general tendencies of the common law. I am inclined to think that the imposition of such an obligation would lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public.

* * * * * *

"In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food."

In Travis v. Louisville & Nashville R. Co., (Ala.), 62 So. 851, plaintiff was a passenger on a train of defendant, and went into its dining car and ate some fried oysters and some scrambled eggs. Shortly thereafter he was taken sick and symptoms all indicated that his sickness was probably due to the food eaten while in the dining car. Plaintiff was of opinion that the oysters served him on the dining car were spoiled, and that defendant's servants or agents were guilty of negligence in serving him the oysters in their alleged spoiled condition. Suit was brought for the recovery of damages which plaintiff alleged he suffered by reason of such alleged negligence.

The Code of Alabama provides that "any butcher or other person who sells, or offers or exposes for sale, or suffers his apprentice, servant, agent, or other person for him, to sell, offer, or expose for sale, any tainted, putrid, or unwholesome fish or flesh, or the flesh of any animal dying otherwise than by slaughtered when diseased, for the purpose of being sold or offered for sale, upon conviction, be fined not less than one hundred nor more than two hundred dollars, and imprisoned in the county jail, or hard labor for the county for not more than six months."

From a judgment for defendant, the plaintiff appealed. The court, while reversing the case on another point, had this to say as to the duty of defendant in the matter of care in the selection and serving of food upon its dining car:

"The above statute is not aimed at but was passed for the benefit of hotels, restaurants, and public eating houses, as well as for the benefit of those who prepare and eat their food at their own homes.

"A butcher, market man, or other person who sells fish, flesh, etc., to hotel keepers, restaurant keepers, public entertainers, or to private individuals should know something about when the fish or the animal whose flesh he sells was killed, and how it has been kept since it was killed, and as his customers must rely in large measure upon his diligence, good faith, and intelligence, the above statute was passed for the purpose of enforcing the performance of a duty which the nature of such occupations creates in favor of the public. Common experience teaches that public entertainers as well as private individuals must, in a great measure, rely upon the honesty and good sense of the man from whom they purchase the supplies which find their way through the kitchen to the dining room.

"The first count of the complaint was drawn upon the theory that, under the terms of the above-quoted statute, the defendant was liable to the plaintiff if the oysters were in fact spoiled and his sickness was created by reason thereof, although neither the defendant nor any of its servants or agents were guilty of any act of negligence in or about said oysters or in or about serving them to the plaintiff.

"The above statute has no application to the facts of this case, and the trial court was free from error in sustaining the defendant's demurrer to said count.

"A restaurant keeper warrants that the food which he serves in his restaurant belongs to that class of food which is generally accepted to be fit for ordinary human consumption, and that he has used, in the selection and preparation of his food, that degree of care which the law exacts of those who follow his occupation for a livelihood. The

law requires that, in the selection of the food for his restaurant and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. If, in the selection of such food or in preparing it for his customer, the keeper of a restaurant does not exercise that care, and through such want of care his customer who eats the food so selected and prepared is thereby made sick, then he is liable to such customer for the damages so suffered by him. Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715."

The complaint in Bigelow v. Maine Central Railroad Co., (Me.), 85 Atl. 396, alleged injury to plaintiff's health from eating unwholesome and poisonous asparagus served on toast, the asparagus having been packed by a reputable canning concern and bearing a standard label. The can of asparagus complained of was purchased by defendant on either the 15th or the 17th of February, and was served on February 25. It was shown that no precaution was omitted by the carrier in the matter of the inspection of its dining car; that the can, so far as the chef was able to observe, was perfect, and nothing in the appearance, taste, or odor of the asparagus indicated anything wrong with its condition. The plaintiff, however, admitting all these claims to be true, contended that the strict rule of law which prevails in this class of cases would hold the defendant responsible. She claimed that, under the plaintiff's declaration, it was not necessary for her to show privity of contract or negligence, and that due care was no defense; that the defendant, from the nature of its business, was bound to know the unwholesome condition of the food; that defendant impliedly represented and guaranteed that the food was wholesome and fit for consumption, and that if it was not, and the party eating it was injured, defendant was liable. The court said:

"The plaintiff's contention is that the defendant in this class of cases is an insurer of the quality of the product which it serves. We are unable to believe that this is a sound rule, when confined to the sale or use of canned goods.

"It has been the boast of the common law that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of industrial life, business methods, social progress, and scientific invention. Within the last century has appeared from time to time the discovery of devices that have revolutionized the methods and accomplishments of human effort. The subjugation of steam and control of electricity, and the consequent inventions for their practical use, have become instrumental in introducing an epoch in the history of science. Industrial, commercial, and financial projects have also assumed new forms and employed new methods. Yet, to the adjustment of all the new and varied relations arising from the adoption, application, and use of these new agencies and new methods, the principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place.

"Of little less importance than the appearance of the great achievements referred to is the establishment and development of the canning industry in this country and in other parts of the world. It may be said that the art of canning, if not invented within the last century, has, at least, assumed the vast proportions which it has now attained, within a comparatively few years. It involves a unique and peculiar method of distributing, for domestic and foreign use, almost every product known to the art of husbandry. The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller, or host, sustain an entirely different duty, respecting a knowledge of their contents and quality, than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer. With reference to these it may well be considered, as has been held, that having an opportunity to investigate, and thereby to know the quality of their merchandise, they are charged with a responsibility amounting to a practical guaranty.

"The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an op-

portunity to observe and inspect the appearance and quality of the food products they offered to the public, were accordingly charged with knowledge of their imperfections. Winsor v. Lombard, 18 Pick. (Mass.) 57; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. St. Rep. 715. But, upon the state of facts in the case at bar, a situation arises that cannot in the practical conduct of the canning business fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the practical use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just.

"The statement of facts before us shows that the asparagus served to the plaintiff was of a very high brand, sold by a most reputable firm, guaranteed under the Pure Food Law, and without fault or blemish discoverable to the eye, to the smell, or taste. It was apparently a perfect can of what it purported to contain. The plaintiff in February must have known it was a canned product when she ordered it. Windsor v. Lombard, 18 Pick. (Mass.) 57. Upon her order she was entitled to a reputable brand, packed and inspected in accordance with approved methods, and the law implied a warranty on the part of the defendant to furnish it. This obligation was fully met. But what was the legal relation sustained by the plaintiff and defendant with respect to their knowledge, or means of knowledge, of this can of asparagus? It seems to us they were absolutely mutual. * * * With regard to this knowledge or means of obtaining it, they were upon a perfectly equal footing. The plaintiff and the defendant necessarily understood the situation precisely alike. There could be no mistake. The plaintiff knew, or should be charged with knowledge, that the defendant could have no possible information concerning the contents of that can which she did not have. We know of no rule of law which will imply a warranty of that which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investigation, however great. In other words, neither law nor reason require impossibilities. As was said by Chief Justice Shaw in Windsor v. Lombard, 18 Pick. (Mass.) 57, with reference to the inference of an implied warranty in a sale of fish: 'In applying this rule to the present case, the question is what did the parties mutually understand by their contract, as it was reduced to writing.' If we apply this rule to the case at bar, the only possible conclusion is that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly what she ordered. She therefore assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent with the practical use of the product, to test its quality."

Cases arising from eating food in restaurants are analogous and to like effect. Thus in Merrill v. Hodson, (Conn.), 91 Atl. 533, plaintiff alleged that she was made sick and suffered severely in health as a result of having partaken of a dish known as "creamed sweetbreads," served to her by defendant's restaurant. It was alleged that the food served was "sold" to the plaintiff, and that its sale was attended with the implied warranty that it was wholesome and fit for consumption. It was held that there was no such implied warranty, since the transaction did not constitute a sale, but a rendition of service. Discussing the transaction of service of food to a patron of a restaurant, the court said:

> "A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter. Beale, Inkeepers and Hotels, sections 35, 301. In so far as the character of the service performed to their respective patrons is concerned, it is the same * * *. In neither case does the transaction, in so far as it involves the supply of food or drink to customers, partake of the character of a sale of goods. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion

which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor of the service rendered."

Concluding from this line of reasoning that the transaction was not a sale, and therefore there was no implied warranty such as was provided for in the sales act of the State, the court states that the situation was not different at common law, and that apparently the pertinent section of the sales act was taken directly from its English predecessor. The court continues:

> "This being the case, we may safely look for light in resolving the question before us to common-law cases, as well as to any which may have arisen under modern sales legislation. As far as we are aware no case of the latter sort, save the present, has ever reached an appellate tribunal. Of common-law cases we find the following four: Sheffer v. Willoughly, 163 Ill. 518, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914-B, 884; Pantaze v. West, 7 Ala. App. 599, 61 So. 42; Doyle v. Fuerst & Kraemer, 129 La. 838, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913-B, 1110, 56 So. 906. In all of them the right of action was based upon negligence. We know of no case, aside from the present, in which an attempt has ever been made in cases brought to recover for the harmful consequences resulting from unwholesome food or drink supplied by the keeper of an inn, restaurant, or boarding house in the line of his business, to recover upon the strength of an implied condition or warranty of quality. Those which have grown out of a sale of provisions by a dealer are, of course, not in point. In the first of the cited cases the obligations of a restaurant keeper are discussed, and a statement of the law made which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care."

Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, was an action brought to recover damages alleged to have resulted from the eating by plaintiff of oysters served to her by defendant in his restaurant, which oysters were alleged to have been unwholesome and to have caused plaintiff serious illness. Holding that proof of the injury following the eating of the unwholesome food was not sufficient to make a prima facie case in plaintiff's favor, nor to shift the burden upon defendant to establish due care, the court said:

> "It will be observed that plaintiff, in her declaration, averred that the defendants, as restaurant keepers, served plaintiff with oysters, and 'carelessly, negligently, and unskillfully, and through carelessness,' did 'deliver to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous and poisonous,' etc., whereby plaintiff became sick. This was, no doubt, regarded by the plaintiff as a material averment; and it was a material averment, one upon which the right of recovery of plaintiff rested; and, unless the evidence fairly

tended to establish negligence on the part of the defendants, plaintiff could not recover. But it is said in the argument that innkeepers are prima facie liable for losses which happen to the goods of their guests, and, on the same principle, restaurant keepers should be prima facie liable for injury resulting from unwholesome food furnished by them. The law is well settled that the keepers of public inns are required to safely keep the property of their guests, and in case such properly is lost, the innkeeper can only relieve himself from liability by proving that the loss occurred without any fault on his part, or that the loss occurred through the fault of his guest; and the burden of proof to exonerate the innkeeper is upon himself, for the reason that the law, in the first instance, will attribute the loss to his default. * * *

"As respects the goods of a guest, which he takes with him when he stops at an inn, the innkeeper is practically an insurer; and, where an action is brought to recover for goods lost, the guest is only required to show the existence of the relation of innkeeper and guest, and the loss, to authorize a recovery. But as to food served at a restaurant, such as oysters, ice cream, and the like, we are not aware that a similar rule establishing liability ever existed. There is no similarity between the two cases, and the principle that governs one does not apply to the other. If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons, and damages result, he would be liable, if his business be conducted in a careless or negligent manner, and through such negligence a patron is injured. But, where an action is brought to recover damages, the burden is upon the person bringing the action to establish carelessness or negligence.

"Plaintiff claims that, having proved that she ate the oyster broth at the defendants' restaurant, and in consequence became sick, her case is made out, or at least the burden of proof is shifted on the defendants. If this rule was adopted, the plaintiff would be relieved from proving the most important element of her declaration, the negligence of the defendants, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any respectable authority. As the plaintiff failed to introduce any evidence tending to prove the most material averment of her declaration, the instruction of the court to find for the defendants was correct."

The remedy of the plaintiff seems to be to proceed against the packer of canned goods, it being quite generally held that a packer or manufacturer is liable for injurious results arising from eating articles of food prepared for human consumption, which prove to be impure or unwholesome. Trafton v. Davis, 110 Me. 318, 86 Atl. 179; Haley v. Swift, 152 Wis. 570, 140 N. W. 292; Wilson v. J. G. & B. S. Ferguson Co., 214 Mass. 265, 101 N. E. 381.

In Trafton v. Davis, which was a suit to compel a canning company to accept for packing a quantity of corn contracted for, but which was frostbitten before being delivered to the cannery, the court said:

> "Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell, or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. Bigelow v. Maine Central R. R. Co., 110 Me. 105, 85 Atl. 396. Whatever liability for damages there may be in such a case must rest solely upon the packer who cans the goods."

In Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314, the defendant was engaged in the business of putting up in tin cans or vessels and selling meats for domestic use, one of which cans plaintiff purchased from a dealer and, after eating a portion of its contents became sick with ptomaine poison. A judgment for plaintiff was reversed, Mr. Justice Pitney saying in the course of his opinion:

> "Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of con-

tractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Canned goods are, at the present day, in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer or of the customer, until they are opened for use; and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption he, in effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances, the fundamental condition upon which the common-law doctrine of caveat emptor is based—that the buyer should 'look out for himself'—is conspicuously absent; for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and not unwholesome and poisonous.

* * * * * *

"Upon both reason and authority, we are clearly of the opinion—that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer or consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to the intending purchasers that they were fit for food and beneficial to the human body; that, in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders that defendant liable for the damages sustained by the plaintiff thereby."

Washington, D. C. H. O'B. C.
June 10, 1918.

EMPLOYERS' LIABILITY ACT—VIOLATION OF MUNICIPAL SPEED ORDINANCE—CONTRIBUTORY NEGLIGENCE.—An engineer, running his train late under orders, was exceeding the limit prescribed by an ordinance of the municipality. It was contended that, since the federal Employers' Liability Act, under which he brought suit for injury resulting from collision, failed to define either negligence or contributory negligence, the court must look outside and give effect to State statutes and municipal ordinances in arriving at the meaning of the act in this respect. The court held that the act establishes a rule which was intended to operate uniformly throughout all the States, as respects interstate commerce, and in that field is both paramount and exclusive, all state laws on the subject having been superseded. The court said:

> "The act covers the entire field under which the employer in interstate commerce shall be liable for injury to its employee likewise engaged. It pertains solely to the relation of master and servant. It does not supersede state legislation outside of this field, nor does it deal with the duties or obligations of either to the public; but it does supersede all state and municipal legislation governing the circumstances under which the master, while within the provisions of the act, shall be liable for injury to the servant. It follows that the ordinance in question was superseded by the act of Congress."

McLain v. Chicago Great Western R. Co. (Minn.), 167 N. W. 349.

GENERAL ORDERS OF THE DIRECTOR GENERAL.

[NOTE.—General Orders to and including No. 23, except No. 22, were printed in the April and May issues. No. 22 deals with New York Canal matters, and has no practical value to readers of THE MEMORANDUM. Below are presented General Orders Nos. 24 to 29, inclusive, with the exception of No. 27. This order deals with the wage increases, and is too voluminous to be reproduced here.]

May 16, 1918.

GENERAL ORDER NO. 24.

On April 30th a telegram was sent to carriers, instructing them not to renew any expiring fire insurance policies on property in Federal control, and not to take out any new fire insurance policies upon such property. It was provided that carriers might call attention to cases calling for exceptional treatment. A letter was sent to the carriers confirming this telegram, and the letter suggested care for fire prevention in terms similar to the last paragraph of this order.

It is desired to extend the instructions to other insurance than fire insurance, excepting only bonds or policies insuring fidelity of employes in handling funds.

Carriers, therefore, are now instructed not to renew any expiring insurance of any character, covering property in Federal control, or any liability in connection with the operation or use of any such property, or liability for property transported or stored by carriers under Federal control, and not to take out any new policies, or place any additional or new risks under existing policies, of such insurance, except that this order shall not relate to bonds or policies insuring the fidelity of employes in handling funds. Such fidelity bonds or policies shall be continued, and proper provision made for any necessary changes, as heretofore. Carriers may present to the Director General any special circumstances which they believe call for exceptional treatment.

If the termination of insurance in accordance with this order results, as to any particular property, in the discontinuance by the Insurance Company of inspection or other measures for prevention of loss, it will be desirable to adopt proper substitute therefor, and the carrier shall make reasonable and proper temporary provision for such inspection or other preventive measures, reporting its action to this office.

May 20, 1918.

GENERAL ORDER NO. 25.

Effective July 1, 1918, the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be cancelled.

1. Tickets shall be sold only for cash in advance of service. Baggage charges are subject to the same rule as tickets, except C. O. D. baggage, and storage charges, which must be paid in cash before delivery.

2. In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the consignor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier. The form of such bond shall be prescribed by the chief legal officer of the individual carrier, conditioned upon and providing for payment of all charges within forty-eight (48) hours after forwarding or delivery of the freight. Upon receipt and acceptance of such bond a carrier may accept and forward prepaid consignments or may deliver collect consignments in advance of payment of all charges thereon to the amount covered by the bond. Failure to pay such charges within the time prescribed will automatically cancel such credit.

3. Treasurers of individual carriers are required to arrange and conduct all matters relating to such credits. They shall designate the amount, and accept or reject the surety offered. Bonds may be required and accepted for individual consignments or blanket bonds may be accepted from individual shippers or consignees to cover all of their consignments for a given period; the period of the credit in such cases shall, however, be limited to forty-eight (48)

hours on each shipment as prescribed in the preceding paragraph.

4. In case of any question as to the accuracy of charges, bills must be paid as rendered and claims presented for alleged errors. This will not prevent adjustments by agents of obvious errors.

5. Freight consigned to "order" or to "order notify" shall be delivered only upon surrender to the agent of the carrier of the original bills of lading for such freight, and the payment of the freight charges thereon as herein provided. Provided, however, if such bill of lading be lost or delayed the freight may be delivered in advance of surrender of the bill of lading upon receipt by the carrier's agent of a certified check for an amount equal to one hundred and ten (110) per cent of the invoice, or upon receipt of a surety bond either individual or corporate, acceptable to the Treasurer of the carrier in an amount for twice the amount of the invoice.

6. The extension or creation of Local Collection Bureaus or agencies will be authorized by the Director of Public Service and Accounting, as and when such Bureaus may be found to be necessary or expedient.

7. Bonding or Underwriting arrangements with respect to credits extended, now in effect by individual carriers, shall be discontinued as of July 1, 1918, or as soon thereafter as existing contracts are terminable.

8. Advice of the foregoing regulations shall be promptly given to all to whom credit accommodations are now given to the end that the regulations may be put into effect at the time specified with as little inconvenience as possible.

9. Payment of transportation charges by check will be considered as a payment in cash if the person, firm or company signing or endorsing it, is known to the agent to be fully reliable. Checks are not to be taken or cashed by agents under any circumstances, except for transportation charges.

10. Until otherwise ordered, the foregoing rules will not apply to transportation service rendered other Departments of the Federal Government.

May 23, 1918.

GENERAL ORDER No. 26.

Whereas the Act of Congress approved March 21, 1918, entitled *An Act to Provide for the Operation of Transportation Systems While Under Federal Control,* provides (section 10) "That carriers while under Federal Control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control"; and authorizes the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

Whereas it appears that there are now pending against carriers under Federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in States and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose; the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of railroads; and the practice of trying such cases during Federal

control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs;

It is therefore ordered, that upon a showing by the defendant carrier that the just interests of the Government would be prejudiced by a present trial of any suit against any carrier under Federal control which suit is not covered by General Order No. 18 and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of Federal control; *Provided,* if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the Statute of Limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defence of the Statute of Limitations in any such suit which may be brought before October 1, 1918.

This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

This order is not intended in any way to impair or affect General Order No. 18 as amended by General Order No. 18-A.

GENERAL ORDER No. 28.

Washington, D. C., May 25, 1918.

Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes."

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the "Exhibit" hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this the 25th day of May, 1918.

EXHIBIT.

FREIGHT RATES.

SECTION 1. CLASS RATES (DOMESTIC). (*a*) All interstate class rates shall be increased twenty-five (25) per cent.

(*b*) All intrastate class rates shall be increased twenty-five (25) per cent where there are no interstate class rates published between the same points, and shall be governed by the classification, viz: Official Classification, Southern Classification, or Western Classification, exceptions thereto and minimum weights which generally govern the interstate

rates in the same territory, except that the Illinois Classification will be used between points in the State of Illinois.

(*c*) All intrastate class rates shall be canceled where there are interstate class rates published between the same points and the interstate rates as increased by paragraph (*a*) shall apply.

(*d*) After such increase of twenty-five (25) per cent no rates shall be applied on any traffic moving under class rates lower than the amounts in cents per 100 pounds for the respective classes as shown below for the several classifications. Any article, on which Exceptions to any Classification provides a different rating than as shown in the Classification to which it is an exception, will be subject to the minimum as provided below for the class provided therefor in the Classification proper:

OFFICIAL CLASSIFICATION.

Classes	1	2	3	4	5	6
Rates	25	21½	17	12½	9	7

SOUTHERN CLASSIFICATION.

Classes	1	2	3	4	5	6	A	B	C	D
Rates	25	21½	19	16	13	11	9	10	7½	6½

WESTERN CLASSIFICATION.

Classes	1	2	3	4	5	A	B	C	D	E
Rates	25	21	17½	15	11	12½	9	7½	6½	5

ILLINOIS CLASSIFICATION.

Classes	1	2	3	4	5	6	7	8	9	10
Rates	25	21	17½	15	11	12½	9	7½	6½	5

SECTION 2. COMMODITY RATES (DOMESTIC). (*a*) Interstate commodity rates on the following articles in carloads shall be increased by the amounts set opposite each:

Coal. Commodities.	Increases.
Where rate is 0 to 49 cents per ton	[1] 15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	[1] 20 cents per net ton of 2,000 pounds.
Where rate is $1.00 to $1.99 per ton	[1] 30 cents per net ton of 2,000 pounds.
Where rate is $2.00 to $2.99 per ton	[1] 40 cents per net ton of 2,000 pounds.
Where rate is $3.00 or higher per ton	[1] 50 cents per net ton of 2,000 pounds.
Coke:	
Where rate is 0 to 49 cents per ton	[2] 15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	[2] 25 cents per net ton of 2,000 pounds.
Where rate is $1 to $1.99 per ton	[2] 40 cents per net not of 2,000 pounds.
Where rate is $2 to $2.99 per ton	[2] 60 cents per net ton of 2,000 pounds.
Where rate is $3 or higher per ton	[2] 75 cents per net ton of 2,000 pounds.
Ores, iron	30 cents per net ton of 2,000 pounds; except that no increase shall be made in rates on ex-lake ore that has paid one increased rail rate before reaching lake vessel.

[1] Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

[2] Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

Commodities.	Increases.
Stone, artificial and natural, building and monumental, except carved, lettered, polished, or traced	Two (2) cents per 100 lbs.
Stone, broken, crushed, and ground	One (1) " " "
Sand and gravel	One (1) " " "
Brick, except enameled or glazed	Two (2) " " "
Cement, cement plasters, and plaster	Two (2) " " "
Lime	One and one-half (1½) cents per 100 lbs.
Lumber and articles taking same rates or arbitraries over lumber rates; also other forest products, rates on which are not higher than on lumber	Twenty-five (25%) per cent, but not exceeding an increase of five cents per 100 lbs.
Grain, wheat	Twenty-five (25%) per cent, but not exceeding an increase of six cents per 100 lbs.
Other grain	New wheat rates.
Flour and other mill products	Twenty-five (25%) per cent, but not exceeding an increase of six (6) cents per 100 lbs., and increased shall be not less than new rates on wheat.
Cotton	Fifteen (15) cents per 100 lbs.
Cotton linters	New cotton rates.
Live stock	Twenty-five (25) per cent, but not exceeding an increase of seven (7) cents per 100 lbs., where rates are published per 100 lbs., or $15.00 per standard 36-foot car where rates are published per car.
Packing-house products and fresh meats	Twenty-five (25) per cent, except that the rates fom all Missouri River points to Mississippi River territory and east thereof shall be the same as the new rates from St. Joseph, Mo.
Bullion, base (copper or lead), pig or slab and other smelter products	Twenty-five (25) per cent, except— 1. That rates from producing points in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington to New York, N. Y., shall be sixteen dollars and fifty cents ($16.50) per net ton with established differentials to other Atlantic seaboard points, and 2. Rates from points in Colorado and El Paso, Tex., to Atlantic seaboard points shall be increased six dollars and fifty cents ($6.50) per net ton. Separately established rates used as factors in making through rates to the Atlantic seaboard shall be increased in amounts sufficient to protect the through rates as above increased.
Sugar, including syrup and molasses where sugar rates apply thereon	Twenty-five (25) per cent, except: (1) Where the Official Classification applies, 5th class rates as increased will apply. (2) From points east of the Indiana-Illinois State line to points west of the Mississippi River, rates will continue to be made on combination of local rates or of proportional rates if published, to and from the Mississippi River; except that from points on the Atlantic seaboard to the Missouri River, Kansas City, Mo., to Sioux City, Iowa, inclusive, established differentials over the increased rates from New Orleans, La., shall be maintained. (3) From points in the States south of the Ohio River and east of the Mississippi River, also from points in the States of Louisiana and Texas, rates shall be increased: To Chicago, Ill., twenty-two (22) cents per 100 pounds; to St. Louis, Mo., twenty-seven and one-half (27½) cents per 100 pounds; to other points west of

Commodities.	Increases.
	the Indiana-Illinois State line and west of the Mississippi River, except points in Arkansas, Louisiana, and Texas, twenty-two (22) cents per 100 pounds; to points on and north of the Ohio River and east of the Indiana-Illinois State line rates shall be increased to maintain the former established relation to the rates to such points from producing points on Atlantic seaboard.
	(4) From producing points in Colorado, Wyoming, Montana, Kansas, and Nebraska to Missouri River territory and points in Arkansas, Oklahoma, Louisiana, and Texas and points east thereof twenty-two (22) cents per 100 pounds.
	(5) From points in Idaho and Utah to points named in paragraph (3) rates shall be fifteen (15) cents above the rates from eastern Colorado.
	(6) From points in California to points taking Missouri River rates and points related thereto under the Commission's Fourth Section Orders, and to points east of the Missouri River, twenty-two (22) cents per 100 pounds.

(*b*) Interstate commodity rates not included in the foregoing list shall be increased twenty-five (25) per cent.

(*c*) Intrastate commodity rates shall be increased as shown in paragraphs (*a*) and (*b*) of this section where there are no interstate commodity rates published on substantially the same commodities between the same points, and shall be subject to the minimum weights applicable on interstate traffic in the same territory.

(*d*) Intrastate commodity rates shall be canceled where interstate commodity rates are published on substantially the same commodities between the same points, and the interstate rates as increased by paragraphs (*a*) and (*b*) of this section shall apply.

(*e*) In applying the increases prescribed in this section the increased class rates applicable to like commodity descriptions and minimum weights between the same points are not to be exceeded, except that the increases in rates on sugar in carloads shall be made as expressly provided in paragraph (*a*) of this section.

SECTION 3. Export and Import Rates. All export and import rates shall be canceled and domestic rates applied to and from the ports.

SECTION 4. Filing Intrastate Tariffs with Interstate Commerce Commission. (*a*) All intrastate rates and all rates for transportation by water, which are to be increased under this order, if not now on file, except rates canceled under paragraph (*c*) of section 1 and paragraph (*d*) of section 2, shall be immediately filed with the Interstate Commerce Commission.

(*b*) All items which are confined in their application to intrastate traffic, but are now carried in tariffs on file with the Interstate Commerce Commission, if not canceled under paragraph (*c*) of section 1 and paragraph (*d*) of section 2, shall be made applicable to all traffic.

SECTION 5. Minimum Charges. (*a*) The minimum charge on less than carload shipments shall be as provided in the classification governing, but in no case shall the charge on a single shipment be less than fifty cents.

(*b*) The minimum charge for carload shipments shall be fifteen dollars per car. Does not apply to charges for switching service.

SECTION 6. Disposition of Fractions. In applying rates, fractions shall be disposed of as follows:

(*a*) Rates in cents or in dollars and cents per 100 pounds or per package.

Fractions of less than ¼ or 0.25 to be omitted.

Fractions of ¼ or 0.25, or greater, but less than ¾ or 0.75 to be shown as one-half (½).

Fractions of ¾ or 0.75, or greater, to be increased to the next whole figure.

(*b*) Rates per ton:

Amounts of less than five cents to be omitted.

Amounts of five cents or greater, but less than ten cents, to be increased to ten cents.

(*c*) Rates per car:

Amounts of less than twenty-five cents to be omitted.

Amounts of twenty-five cents or greater, but less than seventy-five cents, to be shown as fifty cents.

Amounts of seventy-five cents or greater, but less than one dollar, to be increased to one dollar.

SECTION 7. Observance of Differentials. In establishing the freight rates herein ordered, while established rate groupings and fixed differentials are not required to be used, their use is desirable, if found practicable, even though certain rates may result which are lower or higher than would otherwise obtain.

PASSENGER FARES AND BAGGAGE CHARGES.

SECTION 8. This order shall apply to all the passenger fares, both interstate and intrastate, of the railroads under Federal control. No existing fare equal to or in excess of three (3) cents per mile shall be reduced. All fares now constructed on a lower basis than three (3) cents per mile shall be advanced to the basis of three (3) cents per mile. All fares which are on a lower basis than the said existing or advanced fares, as the case may be, such as mileage or excursion tickets, shall be discontinued. These requirements are subject to the following exceptions:

(*a*) The provisions of sections 1 and 22 of the act to regulate commerce, which authorize free or reduced fares or transportation, may be observed, except—

First. That no mileage ticket shall be issued at a rate that will afford a lower fare than the regular one-way tariff fare, and except—

Second. That excursion tickets may be issued only to the extent and on the terms set forth in paragraphs (*b*) and (*c*) below:

(*b*) Round-trip tourist fares shall be established on a just and reasonable basis bearing proper relation to the one-way fares authorized by this order, and tariffs governing same shall be filed as promptly as possible with the Interstate Commerce Commission.

(*c*) For the national encampment of the Grand Army of the Republic and auxiliary and allied organizations at Portland, Oreg., in 1918, and for the United Confederate Veterans Reunion, auxiliary and allied organizations at Tulsa, Okla., in 1918, a rate of one cent per mile in each direction via direct routes shall be authorized and confined by certificate of identification to the membership of these organizations and members of their immediate families. For the various State meetings of these organizations held during the year 1918, fares shall be authorized under like conditions on basis of two (2) cents per mile in each direction and confined to limits of the State in which the meeting is held.

(*d*) Where public convenience will be served thereby, subject to the approval of the Director General, fares determined by the short line may be applied over longer practicable routes.

(*e*) Officers, enlisted men, and nurses of the United States Army, Navy, and Marine Corps when traveling in uniform at own expense, shall be granted the privilege of purchasing passage tickets at one-third (1-3) the regular one-way fare, via route of ticket, applicable in coach, parlor or sleeping car, as the case may be, when on furlough or official leave of absence, except that this reduced fare shall not be granted on short-term passes from camps or when on liberty from ships or stations to nearby cities.

Applicants for such tickets shall be required to submit for inspection of ticket agent military furlough or other official form of leave of absence and to surrender to ticket agent a furlough fare certificate signed by a commanding officer.

(*f*) Children under five years of age, when accompanied by parent or guardian, shall be carried free; children five years and under twelve of age shall be charged half fare.

SECTION 9. Commutation fares shall be advanced ten (10) per cent. Commutation fares shall be construed to include all forms of transportation designed for suburban

travel and for the use of those who have daily or frequent occasion to travel between their homes and places of employment or educational institutions.

SECTION 10. Passengers traveling in standard sleeping cars and parlor cars shall be required to pay an additional passage charge of sixteen and two-thirds (16 2/3) per cent of the normal one-way fare, and passengers traveling in tourist sleeping cars an additional passage charge of eight and one-third (8 1/3) per cent of the normal one-way fare. The foregoing charges are in addition to those required for the occupancy of berths in sleeping cars or seats in parlor cars.

SECTION 11. The following minimum number of tickets of the class good for passage in sleeping or parlor cars shall be required for occupancy of drawing rooms, compartments or sections in parlor or sleeping car.

Two adult tickets for a drawing room in a sleeping car.

Two adult tickets for a compartment

One and one-half adult tickets for a section.

Five adult tickets for exclusive occupancy of drawing room in a parlor car.

SECTION 12. Passenger fares or charges for accommodation and transportation of passengers entirely by water, or partly by water and partly by rail, shall be increased proportionately with fares and charges for the transportation of passengers via rail.

SECTION 13. The basis for computing charges for excess baggage transported under lawfully effective tariffs shall be sixteen and two-thirds (16 2/3) per cent of the normal one-way passenger fare, with minimum of fifteen (15) cents per 100 pounds and minimum collection of twenty-five (25) cents per shipment.

SECTION 14. Tickets purchased prior to June 10, 1918, will not be honored for passage on and after that date, except—

(*a*) Passengers en route on June 10, 1918, on one-way tickets will be carried to destination by continuous passage without additional charge.

(*b*) Round-trip tickets, portions of which have been used prior to June 10, 1918, or held by passengers en route on June 10, 1918, shall be honored in accordance with original tariff conditions under which sold without additional payment except that they shall be subject to the same requirements as one-way tickets in respect of additional payment for passage in sleeping or parlor cars as prescribed in section 10.

Tickets made invalid for passage by this order will be redeemed from original purchasers as follows:

Unused tickets will be redeemed at amount paid therefor.

Partially used one-way tickets will be redeemed by charging tariff fare at time of journey for portion used and refunding difference between such amount and fare at which sold.

In redemption of mileage, scrips, or credential forms the purchaser shall be given the benefit for the distance traveled of a net basis proportionate to that which would have applied had the entire book been used according to its contract.

SECTION 15. All passenger fares lower than those hereinbefore prescribed, such as mileage, party, second-class, immigrant, convention, excursion, and tourist fares, shall be discontinued until further notice, except that tourist fares shall be reestablished as prescribed in section 8, paragraph (*b*) hereof.

SECTION 16. Tariff provisions intended to assure the long haul to carriers, and which prevent the free interchange of traffic, shall be eliminated.

SECTION 17. Stop-overs on one-way tickets, side trips at free or reduced fares, discounts by use of excess-baggage permits or excess money coupon books, and the sale of one-way tickets bearing limit in excess of time necessary to make trip by continuous passage shall be discontinued.

SECTION 18. Optional routes may be used only when specified in tariffs.

SECTION 19. In publishing fares and charges under this order, tariffs may be used which increase the present fares by fixed percentage to bring them to the bases authorized

herein, even though the actual fares so constructed may be fractionally more or less than three (3) cents per mile.

GENERAL.

SECTION 20. Where the Interstate Commerce Commission prior to the date hereof has authorized or prescribed rates, fares, and charges, which have not been published at the date of this order, the rates, fares, or charges initially established hereunder by applying the increases herein prescribed to the existing or published rates, fares, or charges may be subsequently revised by applying the increases prescribed herein to the rates, fares, and charges so authorized or prescribed by the Interstate Commerce Commission.

SECTION 21. All schedules, viz, tariffs and supplements, published under the provisions of this order shall bear on the title-page the following, in bold-face type:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918.

[1] On passenger tariffs use word "fares." On baggage tariffs use word "charges."

Washington, May 31, 1918.

GENERAL ORDER No. 29.

Whereas certain of the railroads now under control of the Director General have in existence at this time agreements with the International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths and Helpers, Brotherhood Railway Carmen of America, Amalgamated Sheet Metal Workers' International Alliance, and International Brotherhood of Electrical Workers which provide for basis of compensation and regulations of employment; and

Whereas in existing circumstances it is the patriotic duty of both officers and employees of the railroads under Federal control, especially during the present war, promptly and equitably to adjust any controversies which may arise, thereby eliminating misunderstandings which tend to lessen the efficiency of the service:

It is hereby ordered, That the basis arrived at in the annexed understanding between Messrs. A. H. Smith, C. H. Markham, and R. H. Aishton, regional directors, representing the railroads in the eastern, southern, and western territories, which now have, or may hereafter have such schedules or agreements with the chief executive officers of the International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths and Helpers, Brotherhood Railway Carmen of America, Amalgamated Sheet Metal Workers' International Alliance, and International Brotherhood of Electrical Workers be, and the same is hereby, adopted and put into effect as of May 31, 1918.

MEMORANDUM OF UNDERSTANDING.

It is understood that all controversies growing out of the interpretation or application of the provisions of the wage schedules or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government shall be disposed of in the following manner:

1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 2, to consist of 12 members, 6 to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the six organizations of employees hereinbefore named and compensated by such organizations.

2. This Board of Adjustment, No. 2, shall meet in the city of Washington within 10 days after the selection of its members and elect a chairman and vice chairman, who shall be members of the board. The chairman or vice chairman will preside at meetings of the board, and both will be required to vote upon the adoption of all decisions of the board.

3. The board shall meet regularly at stated times each month and continue in session until all matters before it are considered.

4. Unless otherwise mutually agreed, all meetings of the board shall be held in the city of Washington: *Provided*, That the board shall have authority to empower two or more of its members to conduct hearings and pass upon controversies when properly submitted at any place designated by the board: *Provided further*, That such subdivision of the board will not be authorized to make final decision. All decisions shall be made and ap-

proved by the entire board, as herein provided.

5. Should a vacancy occur in the board for any cause, such vacancies shall be immediately filled by the same appointive authority which made the original selection.

6. (Article 6 left blank in this memorandum because article 6 for Railway Board of Adjustment No. 1 refers to matters pertaining to the Commission of Eight. In order that all other articles in this Memorandum of Understanding may bear the same numbers as similar articles for Railway Board of Adjustment No. 1, article No. 6 has been left blank.)

7. The Board of Adjustment No. 2 shall render decisions on all matters in dispute as provided in the preamble hereof and when properly submitted to the board.

8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but matters of controversies arising from interpretations of wage agreements, not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 2, when properly presented to it.

9. Wages and hours, when fixed by the Director General, shall be incorporated into existing agreements on the several railroads, and should differences arise between the managment and the employees of any of the railroads as to such incorporation, such questions of difference shall be decided by the Railway Board of Adjustment No. 2, when properly presented, subject always to review by the Director General.

10. Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or some one officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers, to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 2, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

11. No matter will be considered by the Railway Board of Adjustment No. 2, unless officially referred to it in the manner herein prescribed.

12. In hearings before the Railway Board of Adjustment No. 2, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

13. All clerical and office expenses will be paid by the United States Railroad Administration. The railroad directly concerned and the organization involved in a hearing will, respectively, assume any expense incurred in presenting a case.

14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

15. All decisions of the Railway Board of Adjustment No. 2 shall be approved by a majority vote of all members of the board.

16. After a matter has been considered by the board, and in the event a majority vote can not be obtained, then any six members of the board may elect to refer the matter upon which no decision has been reached to the Director General of Railroads for a final decision.

17. The Railway Board of Adjustment No. 2 shall keep a complete and accurate record of all matters submitted for its consideration and of all decisions made by the board.

18. A report of all cases decided, including the decision, will be filed with the Director, Division of Labor of the United States Railroad Administration, with the chief operating officer of the railroad affected, the several regional directors, and with the chief executive officers of the organizations concerned.

19. This understanding shall become effective upon its approval by the Director General of Railroads and shall remain in full force

and effect during the period of the present war, and thereafter, unless a majority of the regional directors, on the one hand, as representing the railroads, or a majority of he chief executive officers of the organization , on the other hand, as representing the employees, shall desire to terminate the same, which can, in these circumstances, be done on thirty (30) days' formal notice, or shall be terminated by the Director General himself, at his discretion, on thirty(30) days' formal notice.

CARRIERS—INTENDING PASSENGER—STARTING TRAIN.—While waiting at the depot a standing train serves as an invitation to all intending passengers to board it, and the invitation carries with it an assurance that the passenger may board the train in safety. But starting the train ordinarily operates as a withdrawal of the invitation. Palmer v. Willamette Valley Southern R. Co. (Ore.), 171 Pac. 1169.

CARRIERS—INTENDING PASSENGER—LEAVING GROUNDS.—Where a bona fide intending passenger leaves the station grounds of the carrier to talk to a person on a county road near by, his status as an intending passenger is at least suspended. It is not the rule that "once a passenger, always a passenger." Palmer v. Willamette Valley Southern R. Co. (Ore.), 171 Pac. 1169.

RAILROADS—CROSSING ACCIDENT—ABSENCE OF SIGNALS.—Where the driver of an automobile, at a distance of 20 feet from the railroad track, saw or could have seen the approach of a train 1,000 feet away, yet went upon the crossing and his car stalled because of oil upon the crossing, the failure of the engineer to give signals was not the proximate cause of the accident. Smith v. Erie R. Co., 169 N. Y. Supp. 831.

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—Plaintiff with a young woman was driving an automobile over a railroad crossing, when the machine stalled because of oil upon the crossing. From a distance of 20 feet from the crossing plaintiff saw or could have seen an approaching train more than 1,000 feet away. For some 16 seconds the occupants of the car sat in their seats after the car stalled, knowing that the train was rapidly approaching. The young woman was killed and the driver of the car, the plaintiff, injured by being struck by the train. The court said:

> "Assume that he was there by no fault of his own. Make allowance for the emergency, and the natural desire to save his property, and his momentary expectation that he would succeed in moving his car. There is a limit to such considerations. The agency that was coming swiftly to destroy him and his passenger should have ruled him to save life rather than property. It is an irrational excuse that his slipping wheels would not carry his person from danger, when he had the chance to go free from harm and let the young woman live. I cannot but think that he took a dangerous chance in going on the track, and that, even if he was detained there for a time by the condition of the crossing, he negligently and unnecessarily continued the exposure to danger. A person may risk an oncoming train to save life, but not to save property."

Smith v. Erie R. Co., 169 N. Y. Supp. 831.

INTERSTATE COMMERCE—ELECTRIC LINEMAN WIPING INSULATORS—EMPLOYERS' LIABILITY ACT NOT APPLICABLE.—An electric lineman was engaged in wiping insulators on a main power line carrying alternating current to substations, which converted it to direct current for operating cars in interstate commerce. He was killed by electric shock, and the Industrial Accident Commission of California held that he was not engaged in interstate commerce within the federal Employers' Liability Act and made an award in favor of his dependents. The award was affirmed by the Supreme Court of California. Southern Pac. Co. v. Industrial Accident Com. (Cal.), 171 N. W. 1071.

TARIFF— UNDERCHARGE — JURISDICTION.—The Federal District Courts have jurisdiction under Section 24 of the Judicial Code of an action by a railroad company against a consignee to recover a charge provided for by duly established tariff for disinfecting cattle cars containing stock moving in interstate commerce. Louisville and Nashville R. R. Co. v. Rice, decided by U. S. Supreme Court May 20, 1918.

PERSONAL INJURY CLAIMS

The following Circular Letter No. 209 of the Regional Director for Southern Territory was issued May 28, 1918:

To All Railroads and Terminal Companies Under Federal Control—Southern Territory:

The Federal Control Act contemplates that suits for personal injuries may be brought as heretofore, but provides that executions may not be levied on the property of the carrier while in the possession of the Government. This means that while a judgment may be recovered, it devolves upon the Director General to provide for payment and this places upon him the responsibility of considering the merits of the claims and the persons to whom payment is made. It is the desire of the Director General that justice shall be done to all employees who are injured in the discharge of their duties. This does not mean that verdicts based upon prejudice or passion shall be paid or that large sums shall be paid by the Government to attorneys and solicitors who have no claim upon the Government. The right is reserved to consider the merits in determining what provision shall be made.

It will be the policy of the Government to discourage ligitimate hrdl llvbgkyq xzgfik gfi discourage litigation, and to deal directly with injured persons to the end that the injured person may receive the benefit of any amount which the Government pays, without the expense of litigation, and without being compelled to turn over one-third or one-half to an attorney. You may, therefore, let it be known that such claims will be considered on its merits.

As to fee contracts: You are authorized to exercise a wise discretion, and are not required to make payment as provided therein, but only on such terms as will enable the person injured to receive just treatment. If the contract, is unjust, you may pay the attorney such reasonable sum as will pay him for the services actually rendered.

Order Notify Shipment—No Goods Received By Carrier—Liability To Bona Fide Holder of Bill of Lading.—The defendant carrier's agent issued an order notify bill of lading containing the notation "shippers load and count" though no goods were received for shipment. Plaintiff was a bona fide purchaser for value of the bill of lading. Held, that the carrier was not liable. Commercial National Bank v. S. A. L. Ry. Co. (N. C.), 95 S. E. 777.

Right of Carrier to Forward Shipment via Interstate Route Where Intrastate Route with Lower Rate is Available.—An action was brought by the plaintiff to recover alleged overcharges on shipment of coal from Duluth, Minn., to other points in Minnesota further west. There were two routes from Duluth to the points of destination. The northerly line lay entirely in Minnesota and was about seven miles shorter than tre southerly line which passed through Wisconsin. On the northern, or intrastate, route there were heavy up-grades going west whereas on the southern, or interstate routes the grades were light. On account of the grades it was the practice of the defendant carrier to move all westbound traffic by the southern route and all eastbound traffic by the northern route.

Shipments were delivered to the defendant without routing instructions and were forwarded by the southern route and the interstate rate, which was higher than the intrastate rate, collected.

Held that while it is ordinarily the duty of the carrier to forward an unrouted shipment by the cheapest of two available routes, it is not required to do so, where, all things considered, it is unreasonable to use the cheaper route. The use of the more expensive route may be justifid by either the peculiar circumstances of a particular case or by a general practice.

Where a general practice is relied upon as in this case the reasonableness of such practice is an administrative question to be determined by the Interstate Commerce Commission, and until this question has been determined by the Commission the courts may not be resorted to. Northern Pac. Ry. Co. v. Solum, decided by U. S. Sup. Ct. June 10, 1918.

Interstate Commerce—Employers' Liability Act—Leaving Work.—Where an employee is actually engaged in interstate commerce, he is so engaged while leaving the carrier's yard at the close of the day's work, since he is but discharging one of the duties of his employment; provided, of course, that he is leaving by the proper or usual way, or at least by a way known to and expressly or tacitly permitted by the employer. Ewig v. Chicago, M. & St. P. Ry. Co. (Wis.), 167 N. W. 442.

FEDERAL EMPLOYERS' LIABILITY ACT—BURDEN OF PROOF MATTER OF SUBSTANCE.—A brakeman employed in interstate commerce was run over and killed by an engine in the yard at New Orleans. His administratrix sued for damages in a Mississippi state court, charging negligence and relying upon the federal Employers' Liability Act. Reversing the state courts, the United States Supreme Court held that the burden of proof in cases brought under this act is a matter of substance, and not merely of procedure, and is not subject to control by the laws of the several States. New Orleans & N. E. R. Co. v. Harris, Admx., No. 276, October Term, 1917, United States Supreme Court, decided June 3, 1918.

FEDERAL EMPLOYERS' LIABILITY ACT—COMMON LAW AS CONSTRUED BY FEDERAL COURTS GOVERNS.—Where suit is brought under the federal Employers' Liability Act to recover damages for fatal injury to a brakeman engaged in interstate commerce, the rights and obligations involved depend upon said act and upon the applicable principles of common law as interpreted and applied in federal courts. New Orleans and N. E. R. Co. v. Harris, Admx., No. 276, October Term, 1917, U. S. Supreme Court, decided June 3, 1918.

EMPLOYERS' LIABILITY ACT — MISSISSIPPI "PRIMA FACIE" ACT NOT APPLICABLE.—In a suit to recover damages for fatal injury to plaintiff's intestate, under the federal Employers' Liability Act, the trial court in Mississippi gave the following instruction:

> "The court charges the jury for the plantiff that under the rule of evidence under the Mississippi statute known as the prima facie statute all that the plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence."

The United States Supreme Court held that the court erred in giving this instruction, and that defendant's negligence is an affirmative fact which plaintiff must establish in suits arising under the federal Employers' Liability Act. New Orleans & N. E. R. Co. v Harris, Admx., No. 276, October Term, 1917, U. S. Supreme Court, decided June 3, 1918.

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THE MEMORANDUM

Vol. III No. 12

LAW DEPARTMENT JULY, 1918. SOUTHERN RAILWAY COMPANY

DUTY OF RAILROAD COMPANY TO AWAKEN SLEEPING PASSENGER IN COACH.

That the law does not impose upon the conductor or other employee in charge of a passenger train the duty of arousing a passenger who has fallen asleep in his seat in the coach, and seeing that he alights when he arrives at his destination, is well settled by the holding of a number of well considered cases in various jurisdictions. The general rule is that the obligation of the carrier has been discharged when the station is audibly announced in the coach, and that there is no duty to make personal announcement to particular passengers unless by reason of their physical or mental infirmities, known to the trainman in charge, they necessarily require special attention and assistance in alighting from the train.

Among the best general statements to be found among the text-writers on this point are the following:

Michie on Carriers, sec. 2476:

> "The duty of railroad companies to notify passengers that their stations have been reached is discharged, except as to passengers occupying berths in sleeping cars, by announcing the names of the stations, and they are under no obligation to awaken sleeping passengers. Nor does the fact that in some previous instances the conductor had aroused sleeping passengers when their destination had been reached afford evidence of a custom binding upon the company."

Hutchinson on Carriers, 3d ed., sec. 1128:

> "It is ordinarily no part of the carrier's duty to see that passengers are awake when the train reaches their destinations, and the company is not bound by the conductor's promise to so awaken a passenger."

Elliott on Railroads, 2d ed., sec. 1621:

> "It is held that a railroad conductor is not bound to arouse from sleep a passenger whom he knows is to leave the train at a designated station, but that it is the duty of the employees of a sleeping car company to awaken a passenger in time to get off the train at the place where it is known he desires to stop. There is good reason for making a distinction between the classes of cases referred to, for the particular duty to awaken a sleeping passenger is clearly implied in the general duty to provide him with sleeping accommodations to a designated station."

The leading case upon which the conclusions of each of these writers are primarily based is Sevier v. Railroad Co., 61 Miss. 8, 48 Am. Rep. 74. The conductor in this case, after the passenger had boarded his train holding a ticket to Jackson, was told by the passenger that he was sick and drowsy, and that he was liable to fall asleep; and the conductor was asked and promised to awaken the passenger if he should be asleep when Jackson was reached. The conductor failed to awaken the passenger until after the train was some four miles out of Jackson, and suit was brought for damages for failure to awaken him and allow him to alight at Jackson, his destination. Defendant was granted a nonsuit, and the Supreme Court of Mississippi affirmed the lower court, saying:

> "It was not the duty of the conductor to arouse the appellant on the arrival of the train at Jackson by any special means applicable to his condition as being sick and drowsy. The business of the conductor was to manage the train according to the established regulations, and not to vary them for an individual. Regulations are made for the traveling public and should be reasonable as adapted to the convenience of the pub-

lic. If persons sick or under any disability which renders them unable to conform to the reasonable regulations for the community generally are inconvenienced by this disability, they have no legal cause of complaint against a carrier who undertakes to carry the public generally, according to a plan adopted to suit persons generally in a condition to travel, and not designed to meet the wants of those not in such condition. The obligation of the carrier was to carry appellant safely to Jackson, and on arrival there to announce the fact, and afford an opportunity for him to leave the car. That he was asleep, and that his sleep was induced by sickness, did not entitle him to special attention. It was his misfortune to be sick, and yet called on to act as a well man, being on a train run for those able to travel on cars, and conform to the regulations for their operation. One too sick or from any cause not able to do as travelers usually do in conforming to the usage in running trains for the traveling public, should avoid them or secure the assistance necessary to enable them to accomplish what is required of passengers generally. Carriers are not required to adapt their methods to the circumstances of those not in condition to comply with the requirements made of travelers generally."

In Seaboard Air Line R. Co. v. Rainey, 122 Ga. 307, 50 S. E. 88, plaintiff purchased a ticket from defendant's agent at Savannah, Ga., for passage from that point to Brunswick, Ga., over defendant's road from Savannah to Thalman and over a connecting line from the latter place to Brunswick. After leaving Savannah, the conductor of defendant's train examined plaintiff's ticket and informed him that he must change cars at Thalman. Plaintiff in his petition stated that he was very tired and went to sleep on the car, expecting that the conductor would arouse him and notify him of arrival at Thalman, where the change of cars was necessary. The petition further alleged that plaintiff was "very easy to awake from sleep, and had the said conductor announced the arrival of said train at Thalman, it was itself sufficient to arouse petitioner from sleep, and the conductor did not announce the arrival of said train." Alleging that as a result of failure to awaken him he was carried to Jacksonville, Fla., and found himself in that city without funds or the possibility of securing accommodations, the plaintiff sought both general and special damages. The defendant demurred, both generally and specially, to the petition, and, upon the overruling of the demurrer, defendant excepted.

The Supreme Court of Georgia, in reversing the lower court, said:

"It is well settled that it is the duty of a railroad company, carrying passengers, in order to afford a passenger an opportunity to leave the train at the station of his destination, to have the name of such station announced upon the arrival of the train, and then to stop the train for a sufficient length of time for him to alight with safety. Southern Railway Co. v. Hobbs, 118 Ga. 227. But there is no duty on the part of the railroad company to awaken a sleeping passenger, in order to advise him that his destination has been reached and to enable him to get off the train there. Nunn v. Georgia Railroad Co. 71 Ga. 710. While a demurrer to a petition or declaration is held to admit the truth of all the material, well pleaded facts alleged therein, it does not admit mere inferences therefrom. * * * Applying the rule that pleadings should be construed strictly against the pleader, it is questionable whether the petition in the present case positively alleges that no agent of the defendant announced the arrival of the train at Thalman. But granting that such an allegation is substantially set out in the petition, it is still fatally defective, for the reason that it does not appear that the plaintiff was misled thereby. He was asleep when the train arrived at Thalman, and although the petition alleges that had the conductor announced the arrival of the train at that place, such announcement would of itself have been 'sufficient to arouse petitioner from sleep,' this allegation is a mere inference or conclusion of the plaintiff, so speculative and uncertain as not to amount to a fact well pleaded. In the very nature of things, it was impossible for the plaintiff to know whether the announcement, if it had been made, would have awakened him. He was in a condition to sleep soundly, as he was 'extremely tired,' and voluntarily went to

sleep, with his mind undisturbed by any apprehension that by so doing he might be carried beyond the station where he intended to leave the train; for he expected that the conductor 'would arouse and notify him of his arrival at Thalman.' In order for the plaintiff to have a cause of action, based on the negligence of the railroad company in failing to have an announcement made of the approach of the train to, or its arrival at, Thalman, it should appear, with at least some degree of certainty, that such negligence was the proximate cause of his being carried beyond that station. It does not appear, from the allegations of the petition, that the plaintiff, if he had been awake, would not have known, without being informed, of the arrival of the train at Thalman. Therefore the fact that he was carried beyond that station, and on to Jacksonville, Fla., may have been due to his own negligence in going to sleep. Indeed it seems more likely that the injury of which he complains was due to his own negligence than it does that it was due to the negligence of the defendant. He was negligent, and the defendant was negligent; and whether the negligence of the one or that of the other was the proximate cause of the injury complained of is a question the solution of which is too conjectural and speculative to admit of satisfactory demonstration by proof."

The undisputed facts in the case of Texas & Pac. R. Co. v. Alexander (Tex.), 30 S. W. 1113, showed that appellee was a passenger on appellant's train holding a ticket for Grand Saline, his home town. The train passed that station at 4 o'clock in the morning, stopped for a reasonable time, and both discharged and received passengers. Later appellee was discovered on the train and asked by the conductor why he had not disembarked at Grand Saline, to which inquiry he replied that he was asleep when the train passed that station. The passenger was allowed free transportation to Terrell, and caught another train back to Grand Saline, after a delay of eight hours, his only expense being 25 cents for breakfast. Action was brought for damages on account of mental and physical pain and extra expense, and a verdict of $300 was rendered in the lower court. The Court of Civil Appeals reversed the judgment, holding that it was not a duty incumbent upon the operatives of the train to arouse appellee and see that he got off the train, but that their duty was to stop the train at the station a reasonably sufficient time for him to get off, and to give reasonable notice of the arrival of the train at the station. "The uncontradicted testimony showing," said the court, "that appellee failed to get off at the place of his destination by being asleep, he was not entitled to recover, and the court should have so instructed the jury."

In Missouri, K. & T. R. Co. v. Perry (Tex.), 27 S. W. 496, plaintiff in the lower court had purchased a ticket from defendant's agent for his passage from Lone Oak to Emory. When the train reached Emory, in the night, it was stopped for a sufficient length of time for passengers to alight, the name of the station having been announced in the usual manner. Plaintiff's evidence indicated that he was asleep when the train stopped at Emory, and did not hear the station announced; that just after the train started a negro man, dressed in train uniform, with a lantern in his hand, came through the car, aroused the plaintiff, and told him that they were at Emory. Plaintiff followed the negro to the platform of the car, and was told by the trainman that the train had just started, and that he (trainman) did not think that there was any danger in his getting off. Acting on this advice, plaintiff attempted to alight from the moving train, and was seriously injured. From a verdict for the plaintiff the railroad company appealed. The lower court was reversed, the Court of Civil Appeals of Texas saying:

"Under the contract of carriage the law implies certain obligations resting upon the carrier, and certain reciprocal duties devolving upon the passenger. The carrier undertakes to transport the passenger safely from the initial point of transportation to the place of destination, to give reasonably sufficient notice of stations, and to afford a reasonable opportunity for the passenger to disembark from the train. When the carrier has performed these obligations, its duties and responsibilities under the contract of carriage cease, and it does not thereafter sustain any contractual relation to the person it has carried. The reciprocal duty rests upon the passenger to get off the train at the place to which he has contracted for carriage, when

reasonable notice has been given, and reasonably safe means and opportunity afforded him for the purpose. The obligation does not rest upon the carrier to put the passenger off the train; nor does the law impose upon the carrier the duty of taking notice that the passenger has fallen asleep, and cause him to be aroused. It is ordinarily the duty of the passenger to use his senses, and take notice of the usual announcement of stations; and if, by reason of being asleep, unknown to the carrier, he fails to hear the notice given of the arrival of the train at his place of destination, and remains on the train, and is carried beyond, the fault is his, and the carrier is not liable therefor. The carrier no longer owes him any contract duty; the relations of the parties have changed, and the grounds of liability become different. If, by his own fault and negligence, the passenger is carried beyond his place of destination, and he attempts to get off the train while it is in motion, without being compelled to do so by the carrier, he assumes the risk of such act, and cannot recover for consequent injuries. The contract of carriage having terminated, and the person being upon the train through his own fault, the company could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon him. The advice of a porter or brakeman to such person that it would not be dangerous to get off a moving train cannot be considered as the discharge of a delegated duty, for no such obligation rested upon the carrier."

Plaintiff in the case of Nunn v. Georgia Railroad Co., 71 Ga. 710, was the possessor of a commutation ticket entitling him to transportation from Atlanta to Clarkson, his home, which was a point between the regular stations of Decatur and Stone Mountain, at which trains stopped to receive and discharge passengers when so notified. He took passage at Atlanta for Clarkston, and when he delivered his ticket to the conductor, informed him that he had lost much sleep the night before, and would probably sleep on his journey, which was for a distance of only 10 miles. He requested the conductor to awaken him when he should reach his destination, and the conductor promised to do so. He slept until he had passed beyond Stone Mountain, the first station beyond his destination, and was then aroused and informed that he had passed his home. He left the train and walked a distance of seven or eight miles to his home, arriving about midnight. It did not appear from the evidence that the train was not halted at Clarkston a sufficient length of time to enable plaintiff to get off, or that the place was not called in the customary manner; nor was it shown that the company undertook that the conductor at each stopping place should go through the train and see that every passenger had safely passed out of the cars. The court held that it was incumbent upon the plaintiff to make out his case and to show that he had been damaged by a violation of his contract with the company; and that he had failed in this. A nonsuit was awarded.

The Supreme Court affirmed the judgment of the Superior Court, relying chiefly upon Missouri, K. & T. R. Co. v. Kendrick, (Tex.), 32 S. W. 42, and upon New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607. "These cases," said the Georgia court, "proceed upon the reasonable ground that passengers are vigilant to perform their parts of the undertaking which they set out to accomplish, and which is only to be done by their own exertions." Continuing, the court said:

> "How far a custom upon the part of conductors, known, or which may be presumed to be known to the company, to assist unattended females, or children, or infirm persons, will modify these rules, we do not now decide, as there is nothing in this case falling within such a principle. This was a drowsy man, traveling a distance of ten miles; he made no contract with the company to have him aroused, in case he should be asleep when he reached his destination; he relied upon the courtesy of the conductor to do him this kind office, as it seems he had on previous occasions done for him, and perhaps for some others. These exceptions and occasional instances afforded no evidence of a custom binding upon the company. The plaintiff failed to make out any case, and there was no error in sustaining the motion for a nonsuit."

In the Statham case, referred to in this opinion, this principle was thus applied by

the Mississippi court to sick and impotent persons:

> "Railroad cars are not traveling hospitals, nor their employes nurses. Sick persons have the right to enter the cars of a railroad company; as common carriers of passengers, they cannot prevent their entering their cars. If they are incapable of taking care of themselves, they should have attendants along to care for them, or to render them such assistance as they may require in the cars, and to assist them from the cars at the point of their destination. It is not the duty of conductors to see to the debarkation of passengers. They should have the stations announced; they should stop the trains sufficiently long for the passengers for each station to get off. When this is done, their duty to the passengers is performed. All assistance that a conductor may extend to ladies without escorts, or with children, or to persons who are sick, and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty."

42 Miss. 607, 613.

Other cases that may be cited as supporting the rule above stated are Nichols v. Chicago & W. M. R. Co., 90 Mich. 203; Pennsylvania R. Co. v. Kilgore, 32 Penn. St. 294; Fisher v. Paxson et al. (Pa.), 38 Atl. 407.

As indicated in some of the above cases, even where the conductor promises the passenger, after the latter has gone upon the train, that he will awaken him at his destination if he shall have fallen asleep, no duty on the part of the company arises for breach of which plaintiff may recover damages. Such a promise is held to be without the scope of the conductor's employment, and therefore without consideration—a mere courtesy on the part of the conductor. On this point Mr. Michie, in his work on Carriers, section 2476, says:

> "Even though the conductor of a train may have promised a passenger to awaken him when his station is reached, the carrier ordinarily is not responsible for carrying the passenger past his station in consequence of the failure of the conductor to keep his promise. It has been so held in a Mississippi case in which it appeared that a passenger who got on a train while sick with a fever, without making his condition known before or on entering the train, notified the conductor that he was sick and drowsy and wished to sleep, and was promised by the conductor that he should be awakened when his station was reached."

The case referred to is Sevier v. Railroad Co., supra, in which the court said:

> "The agreement of the conductor to arouse the appellant at Jackson did not impose any obligation on the railroad company. The appellant was bound to know that the conductor had no authority to incur an obligation to that effect for the company, and that his duty was to the passengers generally, and not to him particularly. He must be held to have known the established usage of calling out the name of the station, and for the passengers to leave the car on its arrival at his destination, and that the promise of the conductor was his personal obligation, and was not the promise of the company, which he had no right to bind by an undertaking in behalf of one of many passengers to all of whom, respectively, the company owed the same duties."

In the Nunn case, supra, the Georgia court said:

> "It was certainly not necessary to the performance of the ordinary duties of the conductor in putting passengers off the train that he should give them any other than the customary warning, and opportunity to avail themselves of it. The regulations under which he acted required nothing more at the hands of the company; its contract was made with that view, and any requirement in excess of it would be a departure from the terms of the contract. To this additional act the company did not assent."

The case of Edwards v. St. Louis Southwestern Ry. Co. (Ark.), 203 S. W. 588, decided May 6, 1918, fully supports the rule above laid down. Plaintiff had sat up with his wife, who was ill, until after midnight.

He bought a ticket from Brinkley to Clarendon, and embarked on one of defendant's passenger trains for his destination. He was very tired and sleepy, and on that account, according to his testimony, he took a seat in the first chair in the coach, so that he would either be awakened by the train officer's touching him to take up his ticket, or he would hear the station announced when the door was opened for that purpose. The distance from Brinkley to Clarendon is short, and the conductor did not take up his ticket until after he had passed Clarendon. Plaintiff got off at the next station and walked back to Clarendon. The conductor testified that he took up the ticket between Brinkley and Clarendon, and that the station was announced by calling it aloud in the coach in which plaintiff was riding. Several passengers got off at Clarendon. A verdict for defendant was affirmed by the Supreme Court, which said:

> "It is well settled that a railroad company carrying passengers, in order to afford them an opportunity to leave the train at their place of destination, is bound to have the names of the different stations announced, upon the arrival of the trains, for a sufficient length of time to enable a passenger to get off with safety, and that a railroad company is liable for a loss or injury which may result to a passenger for a violation of this duty. After properly announcing the name of a station, however, the carrier is not bound to go further, and give personal notice to a passenger traveling on an ordinary passenger train that his station has been reached. The carrier is not required to go through the train and see that every person has safely passed out of the cars. The reason is the passengers entered the cars of their volition to travel to a particular place, and it is presumed that they will leave the car when their station is called and their train stops there. Fetter on Carriers of Passengers, vol. 1, sec. 301; Hutchinson on Carriers (3d ed.), vol 2, sec. 1121; Michie on Carriers, vol 2, par. 2475; 6 Cyc. 587; Seaboard Air Line Railway v. Rainey, 122 Ga. 307, 50 S. E. 88, 106 Am. St. Rep. 134, 2 Ann. Cas. 675, and note; Southern Railroad Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Gilkerson v. Atlantic Coast Line R. Co., 99 S. C. 426, 83 S. E. 592, L. R. A. 1915C, 664, Ann. Cas. 1916B, 248, and Note."

While a verdict for the plaintiff was allowed to stand in the case of Gilkerson v. Atlantic Coast Line R. Co. (S. C.), 89 S. E. 549, there was no deviation from the principle set forth above. The court affirmed this principle, but held that the facts of this particular case were such as to take it out of the operation of the general rule, and allowed it to go to the jury on that ground. The facts were that plaintiff was exhausted and had to change cars at 4 o'clock in the morning, and notified the conductor of these facts. The conductor promised to awaken him, but failed to do so until he was four miles past his station. Then the conductor told him that he was a mile beyond his destination, and he could either go to the next station and get a train back to his destination, or he could get off and walk. The plaintiff decided to walk, but found that the distance was four miles instead of one, as he had been informed. He was encumbered with baggage and had to cross several long trestles in the nighttime. A judgment of nonsuit was reversed and the case remanded, and plaintiff's verdict on the second trial was sustained.

Defendant requested the following instruction:

> "When a citizen purchases a ticket for transportation on a railroad from one point to another, he is entitled to be transported to the destination on that particular line, to be notified of arrival at destination, and to be furnished time and opportunity for disembarking; and when a railroad company has transported him, given notice of arrival in the car, and afforded time and opportunity for disembarking, it has performed its duty."

The court approved this instruction as "a correct statement in the abstract," but stated that "it was modified properly to meet the case in hand" by the following addition by the court:

> "I charge you that, except as I told you before, if it is apparent to the conductor that a party is in such a physical condition as to demand that he be given assistance in disembarking, whether from

old age, insanity, or what not, if it is apparent to the railroad that he needs that assistance, it is the duty of the railroad to give it to him."

The action of the lower court in declining to take the case from the jury was sustained.

On the question of the consideration for the conductor's promise to awaken plaintiff, the court remarked:

"The appellant suggests that the defendant got no consideration for the conductor's promise to overlook the plaintiff at Sumter. It is true that no extra compensation was paid in money; but there are small services which a carrier can render to its patron, valuable to the patron, yet worthless in the matter of cents; and it is also true that the patron sometimes ungraciously seeks to convert into a charge that which was intended as a gratuity."

THOMAS H. DANIEL.

Washington, D. C., July 15, 1918.

EJECTION OF TRESPASSER — INJURY TO SERVANT—ASSUMPTION OF RISK.—Plaintiff's intestate, a brakeman, was directed by his superior to put off certain tramps who had gotten on the train, and while carrying out this instruction he was shot and killed by one of the tramps. The complaint recited that on a former occasion when directed to put off trespassers the deceased had refused, on the ground that it was dangerous to do so, and that he had been discharged for such refusal and that when directed to perform this service, he believed that he would lose his position if he refused to obey, and relied upon the judgment of his superior in undertaking the ejectment. The Supreme Court of Arkansas sustained a demurrer to the complaint, holding that the plaintiff's intestate, when killed, was discharging one of the duties of his employment as brakeman, the ordinary risks of which he assumed when he took service. It was not shown that there were extraordinary dangers attending the discharge of that particular duty, of which the employer or his vice principal knew, or by the exercise of ordinary care ought to have known, so as to make it incumbent to warn the servant of the danger or to refrain from directing him to perform the duty. The duty of ejecting trespassers necessarily devolved upon some employee in charge of the train, and it did not constitute an act of negligence to perform that service or to direct another employee to do so, except under peculiar circumstances which rendered the service, or the manner in which it was to be performed extraordinarily dangerous. Jaynes v. Bush, receiver, (Ark.), 203 S. W. 693.

CARRIERS OF PASSENGERS—SUDDEN JERKS—RES IPSA LOQUITUR.—Where plaintiff's intestate, in walking down the aisle of a car preparatory to alighting therefrom, was thrown to the floor of the car and fatally injured by the sudden jerking of the train, the question of fact was presented as to whether the fall was caused by a sudden starting forward of the train after it had come to a full stop, or by the movement of the train incident to its coming to the first stop. The Supreme Court of Tennessee held that there could be no recovery in the event that intestate fell before or at the time of the first stop without a showing of an unusually violent or negligent jerk or lurch of the train; that the principle of *res ipsa loquitur* did not apply, since it did not appear that there was any force or violence that was not usual and incident to the ordinary or efficient operation of the train; that an inference of negligence, on this phase of the case, arises only when the jerk or lurch is shown to be extraordinary, so as to be attributable to unskillful handling of the train or other fault of the carrier. Nashville, C. & St. L. R. Co. v. Akin (Tenn.), 203 S. W. 329.

FIRE SET OUT BY LOCOMOTIVE—EVIDENCE.—Action was brought against a railroad company for damages for the destruction of plaintiff's machine shops, etc., by fire alleged to have been set out from a certain locomotive of the defendant. Plaintiff sought to show that similar damages had resulted from other locomotives of defendant to other property along its line. The court held that such evidence was not admissible without a showing first by plaintiff that the management, equipment of the engine, and other surrounding conditions were similar. It was further held that if the locomotive alleged to have set out the fire was properly constructed and equipped, and operated skillfully and prudently, there was no liability. Douglass v. Central of Ga. Ry. Co. (Ala.), 78 Sou. 457.

GENERAL ORDERS OF THE DIRECTOR GENERAL.

General Order No. 28, promulgated May 25, 1918, published in the June issue of THE MEMORANDUM, has been amended by the following Supplement, dated June 12, 1918:

SUPPLEMENT TO GENERAL ORDER No. 28.

Washington, D. C., June 12, 1918.

It is ordered that General Order No. 28 be, and the same is hereby, supplemented by amending the terms and provisions of the exhibit attached thereto as follows:

Paragraphs (*b*) and (*c*) of section 1, paragraphs (*c*) and (*d*) of section 2, and paragraph (*b*) of section 4 are canceled.

Paragraph (*a*) of section 1 is amended to read as follows:

(a) All class rates, both interstate and intrastate, shall be increased twenty-five (25) per cent, except that between points in the State of Oklahoma the class rates for single and joint lines prescribed by the Interstate Commerce Commission for use between Shreveport, La., and points in Texas common-point territory, as shown on pages 345 and 346 of the forty-eighth volume of Interstate Commerce Commission reports, plus twenty-five (25) per cent, shall be applied.

Paragraph (*d*) of section 1 is amended to read as follows:

(d) After such increase no rates shall be applied on any traffic moving under class rates lower than the amounts in cents per 100 pounds for the respective classes as shown below for the several classifications. The minimum rate on any article shall be the rate for the class at which that article is rated in the classification shown below applying in the territory where the shipment moves.

OFFICIAL CLASSIFICATION.

Classes	1	2	3	4	5	6
Rates	25	21½	17	12½	9	7

SOUTHERN CLASSIFICATION.

Classes	1	2	3	4	5	6	A	B	C	D
Rates	25	21½	19	16	13	11	9	10	7½	6½

WESTERN CLASSIFICATION.

Classes	1	2	3	4	5	A	B	C	D	E
Rates	25	21	17½	15	11	12½	9	7½	6½	5

ILLINOIS CLASSIFICATION.

Classes	1	2	3	4	5	6	7	8	9	10
Rates	25	21	17½	15	11	12½	9	7½	6½	5

Paragraph (*a*) of section 2 is amended to read as follows:

(a) Commodity rates, both interstate and intrastate, on the following articles, applicable on carloads, except as otherwise provided, shall be increased by the amounts set opposite each:

Commodities.	Increases.
Coal:	
Where rate is 0 to 49 cents per ton	15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	20 cents per net ton of 2,000 pounds.
Where rate is $1 to $1.99 per ton	30 cents per net ton of 2,000 pounds.
Where rate is $2 to $2.99 per ton	40 cents per net ton of 2,000 pounds.
Where rate is $3 or higher per ton	50 cents per net ton of 2,000 pounds.

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that in-

crease and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

Commodities.	Increases.
Coke:	
Where rate is 0 to 49 cents per ton	15 cents per net ton of 2,000 pounds.
Where rate is 50 to 99 cents per ton	25 cents per net ton of 2,000 pounds.
Where rate is $1 to $1.99 per net ton	40 cents per net ton of 2,000 pounds.
Where rate is $2 to $2.99 per net ton	60 cents per net ton of 2,000 pounds.
Where rate is $3 or higher per ton	75 cents per net ton of 2,000 pounds.

Where rates have not been increased since June 1, 1917, the increase to be made now shall be determined by first adding to the present rate fifteen (15) cents per ton, net or gross as rated, or if an increase of less than fifteen (15) cents per ton, net or gross as rated, has been made since that date, then by first adding to the present rate the difference between the amount of that increase and fifteen (15) cents per ton, net or gross as rated; and to the rates so constructed the above increases shall now be added.

Where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials to be maintained, the increase to be figured on the highest rated point or group.

Commodities.	Increases.
Ores, iron	30 cents per net ton of 2,000 pounds; except that no increase shall be made in the rates on ex-lake ore that has paid one increased rail rate before reaching lake vessel.
Stone, artificial and natural, building and monumental, except carved, lettered, polished, or traced	Two (2) cents per 100 pounds.
Stone, broken, crushed, and ground	One (1) cent per 100 pounds.
Sand and gravel	One (1) cent per 100 pounds.
Brick, except enameled or glazed	Two (2) cents per 100 pounds.
Cement, cement plasters, and plaster	Two (2) cents per 100 pounds.
Lime	One and one-half (1½) cents per 100 pounds.
Lumber and articles taking same rates or arbitraries over lumber rates; also other forest products, rates on which are not higher than on lumber	Twenty-five (25) per cent, but not exceeding an increase of five (5) cents per 100 pounds.
Grain, wheat	Twenty-five (25) per cent, but not exceeding an increase of six (6) cents per 100 pounds.
Other grain	New wheat rates.
Flour and other mill products	Twenty-five (25) per cent, but not exceeding an increase of six (6) cents per 100 pounds, and increased rates shall not be less than new rates on wheat.
Cotton, any quantity	Fifteen (15) cents per 100 pounds.
Cotton linters	New cotton rates.
Live stock	Twenty-five (25) per cent, but not exceeding an increase of seven (7) cents per 100 pounds, where rates are published per 100 pounds, or $15 per standard 36-foot car where rates are published per car.
Packing-house products and fresh meats	Twenty-five (25) per cent, except that the rates from all Missouri River points to Mississippi River territory and east thereof shall be the same as the new rates from St. Joseph, Mo.
Bullion, base (copper or lead), pig or slab, and other smelter products	Twenty-five (25) per cent, except— 1. That rates from producing points in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington to New York, N. Y., shall be sixteen dollars and fifty cents ($16.50) per net ton with established differentials to other Atlantic seaboard points; and 2. Rates from points in Colorado and El Paso, Tex., to Atlantic seaboard points shall be in-

Commodities.	Increases.
	creased six dollars and fifty cents ($6.50) per net ton. Separately established rates used as factors in making through rates to the Atlantic seaboard shall be increased in amounts sufficient to protect the through rates as above increased.
Sugar, including syrup and molasses, where sugar rates apply thereon	Twenty-five (25) per cent, except— 1. Where the Official Classification applies, 5th class rates as increased will apply: 2. From points east of the Indiana-Illinois State line to points west of the Mississippi River rates will continue to be made on combination of local rates or of proportional rates if published to and from the Mississippi River; except that from points on the Atlantic seaboard to the Missouri River, Kansas City, Mo., to Sioux City, Iowa, inclusive, established differentials over the increased rates from New Orleans, La., shall be maintained. 3. From points in the States south of the Ohio River and east of the Mississippi River, also from points in the States of Louisiana and Texas rates shall be increased by the following amounts less the amount of any advance made in such rates since June 1st, 1917; to Chicago, Ill., twenty-two (22) cents per 100 pounds; to St. Louis, Mo., twenty-seven and one-half (27½) cents per 100 pounds; to other points west of the Indiana-Illinois State line and west of the Mississippi River, except points in Arkansas, Louisiana, and Texas, twenty-two (22) cents per 100 pounds; to points on and north of the Ohio River and east of the Indiana-Illinois State line rates shall be increased to maintain the former established relation to the rates from the same points of origin to Chicago, Ill., and St. Louis, Mo. 4. From producing points in Colorado, Wyoming, Montana, Kansas, and Nebraska to Missouri River territory and points in Arkansas, Oklahoma, Louisiana, and Texas and points east thereof twenty-two (22) cents per 100 pounds. 5. From points in Idaho and Utah to points named in paragraph (4) rates shall be fifteen (15) cents above the rates from eastern Colorado. 6. From points in California and Oregon to points taking Missouri River rates and points related thereto under the Commission's Fourth Section Orders, and to points east of the Missouri River, twenty-two (22) cents per 100 pounds.

Paragraph (*b*) of section 2 is amended to read as follows:

(b) Commodity rates, both interstate and intrastate, not included in the foregoing list shall be increased twenty-five (25) per cent.

Paragraph (*a*) of section 4 is amended to read as follows:

(a) All intrastate rates and all rates for transportation by water, which are to be increased under this order, if not now on file, shall be immediately filed with the Interstate Commerce Commission. Such intrastate rates shall not be applied on interstate shipments and the schedules containing said rates shall be so restricted.

Paragraph (*b*) of section 5 is amended to read as follows:

(b) The minimum charge for a line haul of a carload shipment shall be fifteen dollars, except that on brick, cement, coal, coke, logs, ore, sand, and gravel, and stone (broken, crushed, and ground) the existing rates as increased under section 2 of this order shall apply.

Section 20 is amended to read as follows:

The rates, fares, and charges to be increased under this order are those existing on May 25, 1918, including changes theretofore published but not then effective and not under suspension, except where the Interstate Commerce Commission prior to May 25, 1918, authorized or prescribed rates, fares, and charges which shall have been published after May 25, 1918, and previous to June 15, 1918, the increases herein prescribed shall apply thereto. Such authorized or prescribed rates, fares, and charges not so published shall be subsequently revised when published by applying the increases prescribed herein.

Section 21 is amended to read as follows:

(a) All schedules, viz, tariffs and supplements, covering passenger fares and baggage charges published under the provisions of this order shall bear on the title-page the following in bold-face type:

The fares[1] made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918.

(b) All schedules, viz, tariffs and supplements, published to cover freight rates under the provisions of this order shall bear on the title-page one of the legends shown below in bold-face type:

If all rates therein are to be restricted to apply on intrastate traffic only, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to intrastate traffic only.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If all rates therein are to apply on interstate traffic only, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to interstate traffic only.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If all rates therein are to apply on both intrastate and interstate traffic, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate traffic.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

If some of the rates therein are to apply to interstate traffic and others to intrastate traffic, use the following:

The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to interstate or intrastate traffic, as provided herein.

This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918.

[1] On baggage tariffs use word "charges."

June 12, 1918.

GENERAL ORDER No. 30.

SETTLEMENT OF INTER-ROAD BILLS AND ACCOUNTS.

Effective July 1, 1918, the following regulations shall govern the settlement of all inter-road bills, statements, and accounts rendered by one carrier under Federal control against or for account of another carrier under such control:

(1) Settlements by vouchers and the drawing of drafts in settlement of individual inter-road bills, statements, and accounts rendered by one carrier under Federal control against another carrier under such control, except as provided for in paragraph (2) hereof, shall be discontinued.

(2) The regulations herein prescribed shall not include:

(a) Settlement of accounts between a car-

rier under Federal control and a carrier not under such control.

(*b*) Settlement of accounts between carriers under Federal control for transactions which do not properly belong on the Federal books of either carrier interested.

(3) Each bill, statement, or account made and rendered by one carrier under Federal control against or in favor of another carrier under such control, and forwarded on and after July 1, 1918, shall be plainly stamped on the face thereof, as follows: "Included in settlement, month of ..... 191..." Such stamp shall indicate the month in which the amount represented by the account will be included for settlement by the carrier rendering the account, and it shall be included in the same month's settlement account by the receiving carrier. No such bill, statement, or account made and rendered in one month shall be back-dated for a prior month.

(4) On the first of each month each carrier shall prepare and render each other carrier with which it has inter-road transactions, as a basis for a settlement for the month just ended, a statement of debits and credits, in abstract, showing the nature and total of each bill, statement, or account forwarded by it to each other carrier during the preceding month.

(5) There shall be opened as of July 1, 1918, on the Federal books of each carrier, a clearance or settlement account with each other carrier under Federal control with which it has inter-road transactions.

(6) As inter-road bills, statements, or accounts are made and rendered they shall be charged or credited as the case may be, through the clearance or settlement account prescribed in the preceding paragraph.

(7) As inter-road bills, statements, or accounts are received they shall be:

(*a*) Examined as to correctness, as prescribed in General Order No. 20;

(*b*) Charged or credited to the appropriate operating or other account;

(*c*) Credited or charged (as the case may be) by the receiving carrier to the carrier originating the account through the appropriate clearance or settlement account prescribed in paragraph (5) hereof.

(8) The total of each statement for a given month shall be accepted as rendered, and on or before the fifteenth day of each month subsequent to that for which such statement was rendered the creditor carrier shall draw upon the debtor carrier for the balance between the two statements exchanged by them.

(9) In the event the statement referred to in paragraph (4) indicates that the originating carrier has charged or credited the other carrier with a bill, statement, or account which has not been received, the carrier to which the statement is rendered shall accept the account and credit or debit the originating carrier therewith to the debit or credit of a suspense account. Such receiving carrier shall immediately take the matter up with the oiginating carrier for the purpose of locating the missing bill, statement, or account. If it be found that such amount was included in the statement in error, adjustment shall be made therefor in a subsequent statement. If manifest errors be found in such statements by a receiving carrier, the attention of the originating carrier shall be called thereto and such error or errors shall be adjusted in the statement for the subsequent month.

June 12, 1918.

GENERAL ORDER NO. 31.

Effective July 1, 1918, the following rules and regulations shall govern the accounting for the use of equipment or facilities of one carrier under Federal control by or for the account of another carrier under such control, provided, nothing herein contained shall be construed to warrant the discontinuance of the keeping, rendition and settlement of such accounts by a carrier under Federal control in favor of or against a carrier not under Federal control, in the same manner as heretofore.

I. HIRE OF FREIGHT AND PASSENGER TRAIN EQUIPMENT.

1. The practice of recording, computing and paying per diem, mileage, or rental for the use of freight and passenger train cars of one carrier under Federal control by or for account of another carrier under Federal control, and the adjustment of differences, reclaims, etc., between such carriers which clearly relate to transactions incurred on or after January 1, 1918, shall be discontinued.

2. Junction cards, interchange reports, location records, and all other records and reports necessary to determine the location of equipment shall be kept, rendered, and compiled as heretofore.

II. Joint Facilities—Bills for Use of.

3. Effective with costs incurred on and after July 1, 1918, bills rendered by one carrier under Federal control against another carrier under such control for maintaining and operating (including taxes and rental) tracks, yards, terminals and other facilities, including costs to operate equipment used therein, shall be computed, rendered, charged and paid on the following bases:

(*a*) In cases where the tenancy is not changed under Government operations: The total cost of maintenance, operation, taxes and rental, as provided for under existing agreements, and the amounts thereof borne by each user, for a period not less than six months ended December 31, 1917, shall be determined by the owning or operating carrier. From such costs, the percentage of the total borne by each user to the total costs shall be determined. The percentages thus determined shall be applied monthly to the total costs incurred on and after July 1, 1918, and bills shall be rendered and paid on the results thus obtained.

(*b*) In cases where tenants or users are admitted to facilities not heretofore jointly used: Federal Managers of the facilities to be jointly used shall determine, as between themselves, a fair and equitable arbitrary basis for the apportionment of the total costs of maintenance, operation, taxes and rental which should be paid by each tenant. Such basis shall thereafter during the period of Federal control be used by the owning carrier as a basis for preparation and rendition of bills against the tenants or users, and such tenants or users shall pay such bills as rendered.

(*c*) In cases where the number of tenants or users of facilities now used by tenants under agreements with owners is increased or decreased: The literal compliance with the terms of such agreements shall be temporarily suspended, for the period of Fedral control, and a fair and equitable basis of use shall be determined as prescribed in paragraph (*b*) preceding, except that due regard shall be given to the terms of existing agreements in fixing such arbitrary basis.

(*d*) In cases where a lump sum charge has been made by an owning or operating carrier which is under Federal control for the use of a facility used by another carrier which is under such control, such bills for the lump sum charge shall be rendered and paid during Federal control as heretofore; provided however, if there be a change in such tenancy by the admittance of other tenants or otherwise, and the contractual basis upon which the lump sum charge is made be disturbed thereby, an arbitrary basis of charge by the owner against the tenant or tenants shall be determined as prescribed in paragraph (*b*) hereof.

4. Details heretofore required in support of joint facilities bills, statements and accounts shall be discontinued, except that such bills shall show the totals chargeable and creditable, to the primary operating revenue, expense, tax and rental accounts prescribed by the Interstate Commerce Commission, or which may hereafter be prescribed.

5. If materials and supplies, the value of which is carried in the accounts of one carrier under Federal control, be used by another carrier under such control for maintaining or operating equipment or facilities jointly used, the value at which such materials and supplies are carried in the accounts of the carrier furnishing them shall be billed against and paid for by the carrier using them as heretofore, except that percentages for overheads and other carrying expenses shall not be added to the cost thereof.

June 29, 1918.

General Order No. 32.

Effective with the settlement of interline passenger accounts for the month of June, 1918, and thereafter, during the period of Federal control, the following rules and regulations shall govern the apportionment of revenues from the sale of tickets, collection of excess baggage revenues, and other analogous revenues, derived from interline passenger service, by one road under Federal control to other roads under such control:

(1) Interline passenger revenue shall be apportioned to interested carriers under Federal control by the initial carrier on bases of mileage applying via route over which the service is performed.

(2) Each selling carrier shall determine monthly:

(*a*) The total passengers carried one mile separately for each carrier over whose line tickets are sold.

(*b*) The total revenue applicable to the total passengers carried one mile, as determined by (*a*).

(*c*) The average revenue per passenger per mile by dividing the total revenue (*b*) by the total passengers carried one mile (*a*); such

average to be extended to four points beyond the decimal.

(*d*) The revenue accruing to each carrier by multiplying the passengers carried one mile for each carrier (*a*) by the average revenue per passenger per mile (*c*).

(3) The revenues derived from the various classes of traffic, such as mileage and scrip exchange passage tickets, excess train fare tickets or coupons, etc., which are based upon rates other than three (3) cents per mile, shall be eliminated from the regular sales and apportioned separately on the passengers-carried-one-mile basis. This should also be done in the case of special excursion, military or other traffic interchanged between two or more carriers where, if included, it would serve to distort the average revenue per passenger per mile that would obtain for other carriers interested in the distribution of the entire sales.

(4) Excess baggage revenue shall be divided on the same general basis.

(5) A carrier which, on and after June 10, 1918, may have a standard rate of fare in excess of three cents (3c) per mile, shall be allowed, in the apportionment of revenue on interline tickets, a constructive mileage; such constructive mileage shall be based on the ratio that the excess rate bears to the standard rate of three cents (3c) per mile. Carriers should not claim constructive mileage when fares to be divided are not made a combination of the local fares based on the higher rate per mile. Revenue derived from such traffic should be apportioned as provided in paragraph 3.

(6) The selling carrier shall be held responsible for the correctness of rates and the collection of the proper revenues derived therefrom.

(7) The initial or reporting carrier shall be held responsible for the prompt and proper reporting and distribution of interline revenues collected by it in the manner herein prescribed. Claims should be made for unreported tickets. Claims for substantial errors in apportionment, due to the use of erroneous mileage or erroneous average revenue per passenger per mile, shall, if correct, be accepted and adjusted in reports for the subsequent month. Claims for arithmetical errors, such as errors in calculation, addition, etc., which affect a single carrier's proportion to the extent of $5.00 in any one item, shall likewise be made, and if correct, adjusted; no adjustments shall be made for such errors under $5.00.

(8) Land grant revenues and revenues affected by land grant equalizations, shall, until otherwise ordered, be reported and apportioned separately on bases heretofore applicable.

(9) Arbitraries on account of water transfers, bridge tolls, omnibus and baggage transfers and other similar arbitraries heretofore considered in the division of interline fares, shall be allowed to the carrier to which such arbitraries accrue. Proportions accruing to carriers not under Federal control, including boat and stage lines, etc., shall also be determined and allowed on regular bases heretofore in effect, and reported direct to such lines; such arbitraries and proportions shall be deducted from the gross revenue and the remainder shall be used in establishing the average revenue per passenger per mile for apportionment of revenues to carriers under Federal control.

(10) Interline passenger revenues shall be reported to interested carriers in such manner and on such forms as may be prescribed by the Director of Public Service and Accounting, in instructions to be issued by him, which instructions shall be complied with. For the present, the standard Association form of blanks may be used.

(11) The methods herein prescribed for apportioning interline passenger revenues shall be extended to carriers not under Federal control as far as practicable; therefore, should carriers not under such control desire to avail themselves of the simplified bases for apportioning interline passenger revenues, as herein prescribed, in conjunction with carriers under such control, arrangements may be made between such interested carriers for the extension of such methods.

(General Order No. 33 relates solely to New York and New Jersey Canals under Federal control, and has practically no interest for readers of THE MEMORANDUM.)

GENERAL ORDER NO. 34.

Washington, July 10, 1918.

Carriers subject to Federal control shall sell at public auction to the highest bidder, without advertisement, carload and less than carload nonperishable freight that has been refused or is unclaimed by consignee and has been on hand for a period of sixty days. The consignee, as described in the waybilling, shall

be given due notice by mail of the proposed sale.

Perishable freight shall be sold whenever in the judgment of the agent or other representative of the carrier it is necessary to do so, such reasonable effort being made to notify the consignee as described in the waybilling as the circumstances will permit.

The place of sale of both nonperishable and perishable freight shall be determined by the carrier. The net proceeds, if any, after deducting freight and other legitimate expenses, will be paid over to the owner on proof of ownership.

GENERAL ORDER NO. 35.

Washington, July 11, 1918.

Effective this date, Mr. M. J. Sanders is hereby appointed Federal Manager of Mississippi and Warrior Waterways for the United States Railroad Administration, with headquarters at New Orleans, Louisiana, and, as such, will have charge of the construction and acquisition of equipment for use upon the Mississippi River between St. Louis and New Orleans, and for use upon the Warrior River between the Alabama coal fields and Mobile, and in connection therewith for use upon the Mississippi Sound and connecting waters between Mobile and New Orleans, and will operate such equipment for the Director General of Railroads upon all such waters.

He is hereby empowered to enter into contracts, either in his own name as such Federal Manager or in the name of the Director General of Railroads, for the construction, acquisition or chartering of such equipment, for the purchase of supplies needed in such operations, and for the transportation of traffic upon all such waters.

GENERAL ORDER NO. 36.

Washington, July 18, 1918.

Premiums on fidelity bonds, which have heretofore been paid by or charged to officers, agents, and employees on transportation lines now, or which may hereafter be placed, under Federal control, shall no longer be so handled but shall be charged to operating expenses.

GENERAL ORDER NO. 37.

Washington, July 19, 1918.

(1) The Local Treasurers appointed by Federal Managers or by General Managers appointed in lieu of Federal Managers, shall hereafter be designated "Federal Treasurers" and are expected to devote themselves exclusively to the work of the United States Railroad Administration. They ought not to handle any funds for a railroad corporation or perform any other services therefor except in special cases after obtaining express authority. The Federal Treasurers should be nominated by the Federal Manager (or General Manager appointed in lieu of Federal Manager), and the nomination, when it shall have been approved by the Regional Director, should be transmitted to the Director of the Division of Finance for consideration and final action. In cases where Federal Treasurers have already been appointed the appointments should be submitted promptly through the Regional Director with his recommendations for confirmation by the Director of the Division of Finance.

(2) Immediately up on the appointment of Federal Treasurers the designation of the bank account subject to check of such Federal Treasurers shall be "(Name of Railroad), Federal Account."

(3)

(*a*) All cash representing receipts from the operations of its railroad since and including January 1, 1918, now in the hands of the railroad corporation for whose railroad a Federal Treasurer has been appointed, or held for account of the corporation, and

(*b*) Any and all other cash now in the hands of such railroad corporation or held for its account for use in connection with the operation or improvement of its railroad

shall be at once transferred by the railroad corporation to accounts in the same banks in which it is now held, designated as prescribed in paragraph (2) hereof, which shall be subject to check by the Federal Treasurer.

(4) Federal Treasurers shall draw on the new accounts thus to be opened and subject to their check only for

(*a*) the payment of materials and supplies purchased since December 31, 1917.

(*b*) the payment of operating expenses and taxes (other than the war income tax and the excess profits tax) accrued since December 31, 1917, and

(c) the payment of such addition and betterment costs as may be approved by the Federal Manager (or General Manager appointed in lieu of the Federal Manager).

Federal Treasurers shall not draw on such accounts for any other purposes except when

expressly authorized to do so by the Director of the Division of Finance and Purchases.

(5) A specimen form of check which has been approved for use by all railroads unde Government control it attached hereto. In ordering checks for the use of the railroad the Federal Treasurer will follow as closely as practicable the general arrangement and language of the specimen form. The acc with every bank must be stated in the name of the railroad with the name "Federal Account" immediately following *on the same line* as shown in the attached specimen.

(6) Until further ordered checks signed by the Treasurer should be countersigned according to the practice now in vogue on the different roads where regulations now call for such countersignatures.

WIRE CONTROL RESOLUTION.

[PUBLIC RESOLUTION—No. 38—65TH CONGRESS.]

[H. J. Res. 309.]

Joint Resolution To authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner, as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided,* That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: *Provided further,* That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

Approved July 16, 1918.

TRESPASSING ON TRACK—LAST CLEAR CHANCE.—Plaintiff's intestate, while apparently under the influence of whisky, was lying flat on his stomach, lengthwise, between the rails of defendant, with his feet toward the approaching train. The atmosphere was somewhat smoky, semi-darkness having spread over the wooded swamp through which the train was running at about 7:50 o'clock in the afternoon of June 14. The engineer's testimony, supported by that of experts for both plaintiff and defendant, indicated that when he first saw the dark object on the track, it was only about 100 feet ahead, and that he only recognized it as a human body when about 70 feet ahead, and that with the train he was operating it was impossible to come to a stop, at the speed it was making, within less than 250 feet; that the track was straight, with some grass growing between the rails, and that the equipment of the train was in first-class condition. He further said that it was impossible, under the surrounding conditions, for him to have seen the body any sooner or to have avoided running over and killing plaintiff's intestate. The Louisiana court held that plaintiff, having failed to clearly show that the accident might have been avoided by the exercise of ordinary care on the part of the locomotive engineer, after the danger of the situation was or should have been discovered by him, was not entitled to recover. Tyler v. Gulf, C. & S. F. R. Co. (La.), 78 So. 438.

SLEEPING TRESPASSER—FAILURE TO WHISTLE.—Three boys about 14 years of age lay down beside the railroad track and fell asleep. One of them was killed by some projecting part of the train striking him, and suit was brought for damages for his death. The evidence showed that clouds of dust and a bank

of cinders prevented the engineer from seeing the boys, or recognizing that they were living beings, until it was too late to stop the train before reaching them. The engineer did not then sound an alarm, because he believed the boys were in the clear, and he feared that arousing them suddenly might cause them to move involuntarily into danger. He applied the emergency brake and stopped the train as quickly as it could be stopped, at the same time waving to the boys to remain lying down. The court said:

> "We doubt that the failure of the engineer to blow the whistle when he saw the boys asleep beside the track was an error of judgment; and, if we thought it was, we would not consider it his fault in such an emergency."

Hyde v. Texas & P. Ry. Co. (La.), 78 So. 441.

Crossing Accident—Speed of Train.—Where action is brought for damages for the death of a passenger in an automobile, caused by collision with a train at a public crossing located in the open country, the question of negligent speed of the train was properly excluded from the jury. Piersall's Admr. v. Chesapeake & O. R. Co. (Ky.), 203 S. W. 551.

Block Signals--Presumption.--Plaintiff's intestate was killed in the collision of the train of which he was engineer with the caboose of a train standing in the block. There was no direct evidence that the block system of defendant company was not in order or that at any prior or subsequent time the signals had ever failed to give warning of danger; but on the other hand there was evidence that when the preceding train, with the caboose of which deceased's train collided, passed the signal post going into the block in question the signal swung to danger, and that immediately after the accident the arm of the signal stood at danger. Plaintiff claimed that the fact that deceased ran his locomotive past the signal post and into the block without halting was evidence that neither a danger nor a caution signal was being displayed, and hence justified submission to the jury of the question of defendant's negligence in the operation of its block signals. The contention was overruled, the court holding that there was no presumption that the signal failed to properly operate, and that the jury could not be allowed to guess that it did not. Lyman v. Delaware & H. R. Co., 170 N. Y. Supp. 412.

Crossing Statute—Push Car Not Within Statute.—Where a statute required a street railway, at its crossing over the tracks of a railroad company, to bring its cars to a full stop at a point ten feet from the railroad tracks, and to have an employee go forward and ascertain whether a train was approaching before the car should pass over the crossing, a push car, without means of mechanical propulsion and without brakes, does not come within the purview of the statute. Cuccio v. Terminal Assn. of St. Louis (Mo.), 203 S. W. 493.

Repairing Grade—Interstate Commerce.—An employee engaged in throwing old ties over an embankment on the line of an interstate railway for the purpose of strengthening the fill and making it safer for such transportation is engaged in work so closely related to interstate commerce as to be practically a part of such commerce. Ohio Valley Electric Ry. Co. v. Brunfield's Admr. (Ky.), 203 S. W. 541.

Passengers--Announcement of Stations.—A railroad company carrying passengers is bound to have the names of stations announced upon arrival, a sufficient length of time to enable passengers to get off with safety. "After properly announcing the name of a station, however, the carrier is not bound to go further, and give personal notice to a passenger traveling on an ordinary passenger train that his station has been reached. The carrier is not required to go through the train and see that every person has safely passed out of the cars. The reason is the passengers entered the cars of their own volition, to travel to a particular place, and it is presumed that they will leave the car when their station is called and the train stops there." Edwards v. St. Louis S. W. Ry. Co. (Ark.), 203 S. W. 588.

PUBLICATION SUSPENDED.

It is with regret that announcement is made that further publication of The Memorandum during the period of the war is deemed inadvisable. With this issue, completing Volume III, it will be suspended.

INDEX

ACCIDENTAL DELAYS IN TRANSIT 141
See also 28-hour law.

AGENTS: Recovery of money paid to under mistake of fact 20

BRIDGES: Necessity and sufficiency of guard-rails 109

CAR SERVICE: Division of, created by Interstate Commerce Commission 19
Exclusive jurisdiction of Commission over 29

CLAIMS: Personal Injury: Regional Director's Circular 209 175

CONFERENCE RULINGS 19, 117, 150

CONTRACTS: Constitutional provision against impairment versus poice power of state. 80

CONTRIBUTION between joint tort-feasors 36

CONTRIBUTORY NEGLIGENCE OF RESCUERS 49

CORPORATIONS: Power of State to exclude or impose conditions upon corporation engaged in interstate commerce 85

DAMAGES: Measure of for misrepresentation of ticket agent 105

"DECADE OF DEFENSE," A 41

DELAYS IN TRANSIT, Accidental 141

DINING CARS, Food on 158

DIRECTOR GENERAL OF RAILROADS: See General Orders.

"EMPLOYED IN INTERSTATE COMMERCE" 98

EMPLOYEES: Duty to keep lookout for in yards 152

EMPLOYERS' LIABILITY ACT: "A Decade of Defense" 41

FEDERAL CONTROL:
Proclamation taking over railroads 125
Federal Control Act of March 21 118
General Orders, Director General: See General Orders.
Judgments under, payment of: See General Orders 18 and 26; Judge Payne's Letter. 139
Telegraphs and Telephones 192

FEDERAL LEGISLATION affecting carrier's duty to furnish prompt service 1

FOOD ON DINING CARS 158

FOOD SURVEY ACT 33

FOREIGN JURISDICTION: Dismissal of suits brought in 44, 75

FREIGHT, UNCLAIMED: Sale of: See General Order No. 34.

GENERAL ORDERS, DIRECTOR GENERAL:
Nos. 1 to 18 127-139
Nos. 18 (as amended) to 23 143-146
Nos. 24 to 29 164-174
Nos. 30 to 37 184-192

GUARD RAILS ON BRIDGES: Necessity and sufficiency 109

INTERSTATE COMMERCE:
Attempt of State to require interstate trains to comply with advertised schedules as interference with 89
Power of State to exclude or impose conditions upon corporation engaged in 85
"Employed in," as construed by Supreme Court 98
Validity of State quarantine laws as applied to 69

INTERSTATE COMMERCE COMMISSION, Act enlarging 16
Conference Rulings of 19, 117, 150
Division of Car Service created by 19
Exclusive jurisdiction of over car service 29

INTERSTATE COMMERCE COMMISSION DECISIONS 18, 31, 46, 67, 76, 93, 103, 116, 140, 147

JOINT TORT-FEASORS: Contribution between 36

JUDGMENTS: Payment of under Federal Control: See General Orders 18 and 26; Judge Payne's Letter 139

JURISDICTION: See Foreign Jurisdiction.

LIVE STOCK: See 28-hour Law; Delays in Transit.

LOOKOUT: Duty to keep for employees in yards 152

MISREPRESENTATION BY TICKET AGENT, Liability for 105

MISTAKE OF FACT, Recovery of money paid under 20

NEGLIGENCE: Contributory, of Rescuers 49

PASSENGER ASLEEP IN COACH: Duty to awaken at destination 177

PASSES: See Right of Way Pass.

PASSING TRAINS: Liability for injuries due to suction from 25

PAYMENT OF JUDGMENTS: Judge Payne's Letter concerning 139

PERSONAL INJURY CLAIMS: Regional Director's Circular 209 175

POLICE POWER: Constitutional provision against impairment of contracts versus police power of States 80

PRIORITY ACT 15

PROCLAMATION taking over railroads 125

PROMPT SERVICE: Liability of carrier for failure to furnish, as affected by recent federal legislation 1

QUARANTINE LAWS: Validity of State, as applied to interstate commerce 69

RAILROAD CONTROL ACT, March 21, 1918 118

REGIONAL DIRECTOR'S CIRCULAR 209, Personal Injury Claims 175

RESCUERS, CONTRIBUTORY NEGLIGENCE OF 49

RIGHT OF WAY PASS: Can State by subsequent law invalidate life pass given in exchange for right of way 80

SALE OF UNCLAIMED FREIGHT: See General Order No. 34.

SCHEDULES: State's power to require interstate trains to comply with advertised schedules denied 89

SLEEPING PASSENGER IN COACH: Duty as to awakening 177

STOCK DIVIDENDS, Taxation of: Towne v. Eisner 91

SUCTION FROM PASSING TRAINS: Liability for Injuries due to 25

SUITS:
See General Orders, Nos. 18 (as amended) and 26.
In foreign jurisdictions, dismissal of: See Foreign Jurisdiction.
Judge Payne's letter concerning 139

TAXATION: Stock Dividend case, Towne v. Eisner 91

TELEGRAPH CONTROL RESOLUTION 192

TICKET AGENT: Liability for misrepresentation of 105

TWENTY-EIGHT HOUR LAW, as construed in penal actions 53
The Act 65
See also Delays in Transit.

UNCLAIMED FREIGHT, sale of: See General Order No. 34.

WAR:
Administration of law in time of 114
Improvements "Not Directly Promotive of," disapproved 66

WIRE CONTROL RESOLUTION 192

YARDS: Duty to keep lookout for employees in 152